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ALBERTA LAW REFORM INSTITUTE

The Alberta Law Reform Institute was established on January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding of the Institute's operations is provided by the Government of Alberta, the University of Alberta and the Alberta Law Foundation.

The Institute's office is at 402 Law Centre, University of Alberta, Edmonton, Alberta, T6G 2H5. Its telephone number is (403) 492-5291; fax (403) 492-1790.

The members of the Institute's Board of Directors are Professor E.E. Dais; C.W. Dalton; J.L. Foster, Q.C.; A. Fruman; A.D. Hunter, Q.C. (Chairman); W.H. Hurlburt, Q.C.; H.J.L. Irwin; Professor D.P. Jones, Q.C.; Professor P.J.M. Lown (Director); Dr. J.P. Meekison; The Honourable Madam Justice B.L. Rawlins; A.C.L. Sims, Q.C.; and C.G. Watkins.

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ACKNOWLEDGEMENTS

The publication of this final report represents the culmination of one of the longest and largest projects which the Institute has undertaken.

In 1986 the Institute issued a research paper on the operation of unsecured creditors remedies' system in Alberta (Research Paper No. 16, March 1986) and later in the same year issued Report for Discussion No. 3 entitled *Remedies of Unsecured Creditors*.

The area of prejudgment remedies for unsecured claimants was separated from the main project and dealt with in a discrete final report, No. 50 issued in February of 1988.

There are several people who have had a major part in the preparation of this report, and in the research which preceded it. Professor C.R.B. Dunlop, was seconded from the Faculty of Law for a period of two years and continued after his secondment to prepare the Report for Discussion. He was assisted by Mr. Iain Ramsay, an Institute Counsel who prepared Research Paper No. 16.

During the last three years two Institute Counsel, Mr. Brian Burrows and Mr. Richard Bowes, have been primarily responsible for the preparation of the final report. Mr. Burrows wrote the bulk of the report proper and carried out the

consultation with several reviewers with respect to the substance of our proposals. Mr. Bowes, in particular, has written parts of the report and all of the statutory material and has supervised the task of pulling together all of the material in both volumes in final form. All of these persons have made a significant contribution to the report and to them a large debt of gratitude is owed.

Many individuals offered helpful comments on drafts of the report and model statute. They were: John Bachinski, Dennis Blower, Terry Cooper, Dave Costigan, Ron Cuming, Richard DeGroat, Pat Dumais, Dick Dunlop, Gordon Foffonoff, Geoff Ho, John Holmes, Dave Huff, Doug Lint, Michael McCabe, Carman McNary, Jim McLaughlin, Pater Pastewka, Ken Payne, Rick Reeson, Cliff Shaw, Ian Smith, Edwin Towers, Peter Vaartnou and Rod Wood. We would like to offer special thanks to anyone who we may have accidentally omitted from this list.

Over the last three years a project management committee of Messrs. Bowes, Burrows, Board members Sims, Dalton, Hurlburt and the Director, Professor Lown, have met frequently and at length to discuss these proposals.

It is, of course, the Board of the Institute which assumes sole responsibility for the opinions and recommendations contained in this report.

USING THIS REPORT

This report is in two volumes. Volume 1 contains the report proper. Volume 2 contains a model statute based on the recommendations in Volume 1.

We know that many people who are interested in the subject matter of this report will be unable to read both volumes (or either volume) from cover to cover. If you are in this category, the following suggestions will help you make the most efficient use of the time you spend with this report.

If you want a general overview of our reform proposals, you should read Part I of this volume, which is a brief summary of our report. If you want somewhat more detail than is provided by the summary you can look at the list of recommendations in Part III and the outline charts in Part IV. The latter are charts that contain fairly detailed summaries of the issues discussed and conclusions reached in each chapter.

If you want to find out about our proposals on a particular topic, such as enforcement (execution) against land, you have two choices. You can look at the relevant chapter (or section of a chapter) in this volume or you can examine the relevant part of the model statute in Volume 2. Both volumes contain detailed tables of contents that should help you to find the place in the report or statute where the issue that interests you is addressed.

If you want to know how we deal with an issue that is addressed by a particular section of, say, the *Seizures Act*, you should look at Appendix C in Volume 2. This appendix consists of one-way tables of concordance from sections in various existing statutes to sections in our model statute, which we call the *Judgment Enforcement Act*. So, for example, you will find that the subjects dealt with by section 4 of the *Seizures Act* are dealt with by sections 38 through 49 of the JEA. In the comments to those sections, you will find cross-references to the relevant recommendations in the report.

TEXT OF EXISTING LEGISLATION AND RULES OF COURT

Appendix B in Volume 2 contains the complete text of the *Exemptions Act*, the *Execution Creditors Act*, and the *Seizures Act*, as well as relevant rules from the **Alberta Rules of Court**.

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CITATIONS AND ABBREVIATIONS

CITATIONS FOR CURRENT ALBERTA ACTS

In the text of the report Alberta acts that are currently in force are cited by title only. The full citation for these acts is given below.

Assignment of Wages Act, R.S.A. 1980, c. W-1
Business Corporations Act, R.S.A. 1980, c. B-15
Civil Service Garnishee Act, R.S.A. 1980, c. C-11
Collection Practices Act, R.S.A. 1980, c. C-17
Dependent Adults Act, R.S.A. 1980, c. D-32
Domestic Relations Act, R.S.A. 1980, c. D-37
Employment Standards Code, S.A. 1988, c. E-10.2
Employment Pension Plans Act, S.A. 1986, c. E-10.05
Execution Creditors Act, R.S.A. 1980, c. E-14
Exemptions Act, R.S.A. 1980, c. E-15
Fraudulent Preferences Act, R.S.A. 1980, c. F-18
Insurance Act, R.S.A. 1980, c. I-5
Interpretation Act, R.S.A. 1980, c. I-7
Judgment Interest Act, S.A. 1984 c. J-0.5
Judicature Act, R.S.A. 1980, c. J-1
Land Titles Amendment Act, 1988, S.A. 1988, c. 27
Law of Property Act, R.S.A. 1980, c. L-8
Local Authorities Pension Plan Act, S.A. 1985, c. L-28.1
Maintenance Enforcement Act, S.A. 1985, c. M-0.5
Master and Servants Act, R.S.A. 1980, c. M-8
Members of the Legislative Assembly Pension Plan Act, S.A. 1985, c.M-12.5
Municipal Taxation Act, R.S.A. 1980, c. M-31
Partnership Act, R.S.A. 1980, c. P-2
Pension Benefits Act, R.S.A. 1980, c. P-3
Personal Property Security Act, S.A. 1988, c. P-4.05
Proceedings Against the Crown Act, R.S.A. 1980, c. P-18
Public Service Management Pension Plan Act, S.A. 1984, c. P-34.1
Public Service Pension Plan Act, S.A. 1984, c. P-35.1
Public Lands Act, R.S.A. 1980, c. P-30
Securities Act, S.A. 1981, c. S-6.1
Seizures Act, R.S.A. 1980, c. S-11
Special Forces Pension Plan Act, S.A. 1985, c. S-21.1
Universities Academic Pension Plan Act, S.A. 1985, c. U-6.1
Workers' Compensation Act, S.A. 1981, c. W-16

CITATION OF ALBERTA RULES OF COURT

Citations of rules in the Alberta Rules of Court are by rule number alone. Thus, a reference in the text to "Rule [#]" refers to the rule of that number in the Alberta Rules of Court.

ABBREVIATIONS

A few abbreviations are used in the report. The abbreviations are explained where they are first used, and are also explained below.

ABBREVIATION	ABBREVIATED TERM
PPR	Personal Property Registry
PPSA	*Personal Property Security Act*
ECA	*Execution Creditors Act*
PDOR	Priority Determined by Order of Registration
RRSP	Registered Retirement Savings Plan

PART 1

SUMMARY

CHAPTER 1
INTRODUCTION

A just and efficient process of debt enforcement is fundamental to society. The operational maintenance of our enforcement system has been seriously neglected. Its justness is occasionally suspect and its efficiency is clearly deficient. A major and comprehensive overhaul is long overdue, and in the overhaul, the interests of creditors, debtors and society must be rationalized and balanced.

This report contains our final recommendations on the issues that we raised in our Report for Discussion No. 3, *Remedies of Unsecured Creditors,* 1986. That report identified several general principles confirmed and applied in this report. These include:

a) Universal Exigibility: All of a debtor's property should be subject to enforcement, excepting only such property as is deliberately excepted.

b) Just Exemptions: Such property as the debtor reasonably requires for the maintenance of his family should be deliberately exempt.

c) Sharing among Creditors: The proceeds of enforcement processes should be shared among enforcement creditors.

d) Creditor Initiative: The enforcement system should continue to be creditor driven.

e) One Statute: The entire enforcement system should be governed by one consistent, coherent and logically ordered statute.

f) Judicial Supervision: The enforcement system should operate with a minimum of judicial supervision, but there should be ready access to the court when directions are required.

In addition, the specific recommendation contained in the Report for Discussion, that imprisonment for debt should continue to be prohibited, is confirmed.

CHAPTER 2
THE WRIT OF ENFORCEMENT

The first step in the enforcement process is to interfere with the debtor's ability to alienate his or her property so that it can be used eventually to satisfy the debt owed to the creditors. At present, this is accomplished by delivering a writ of execution to a sheriff. The writ is the document by which enforcement is usually commenced, though it is not required for all processes.

The effect of delivering the writ is to "bind" the debtor's exigible property in that sheriff's judicial district. Only property exigible at common law, generally "tangible" property, is bound—intangible property that was made exigible by statute is not bound. When property is "bound", any transfer of it by the debtor will be subject to the writ. An exception is made for transfers to bona fide purchasers for value who have no knowledge of the outstanding writ. The exception diminishes greatly the significance of the "binding effect".

When the *Personal Property Security Act* comes into force, the system will change slightly. With some significant exceptions, the protection for bona fide purchasers for value will end with the registration of the writ in the Personal Property Registry (PPR). We think that the introduction of this new regime will facilitate more fundamental reforms.

We propose that a writ be delivered to the sheriff before *any* enforcement process is commenced. We suggest that the new instrument be called a "writ of enforcement". It should set out the particulars of the judgment that the creditor has obtained and should authorize the sheriff to accept and follow lawful enforcement instructions from the creditor. Delivery to the sheriff should not interfere, however, with the debtor's ability to alienate his property. This latter effect, the "binding effect", should occur when the creditor registers the writ in the PPR.

After the writ is registered in the PPR, no one should be able to take an interest in the debtor's exigible personal property (whether exigible by common law or statute, and including garnishable debts) except subject to the writ. Exceptions should be made, however, where a debtor grants an interest to a third party in:

a) goods in the ordinary course of the debtor's business;

b) consumer goods worth $1000 or less;

c) a negotiable instrument; or

d) property against which encumbrances must be registered by serial number

where the third party takes the interest for good value and without knowledge of the writ. Persons who take money for value from a debtor should not be affected by a writ, even if they have knowledge of it.

The debtor's interests in land should continue to be bound when the writ is registered as provided in the *Land Titles Act*.

The consequences of delivering a writ to a sheriff and of registering it in the PPR should be province wide and not confined to any one judicial district. We propose the establishment of a computerized "Enforcement Registry", access to which can be had by any sheriff's office to facilitate this and other recommendations that we make concerning the operation of the enforcement system.

The binding effect of the writ should be subject to any security interest in the bound property that existed before the binding effect commenced, whether or not the security interest is registered in the PPR, as long as it is registered before seizure under the writ is effected.

A writ should be valid if issued at a time when the judgment on which it was based is in force, and should continue in force while the judgment remains unsatisfied and in force.

CHAPTER 3

DISCOVERING DEBTORS' ASSETS

Before the creditor can instruct specific enforcement processes, he or she must have some specific information about the debtor and his or her assets. This information is usually obtained by extrajudicial means.

We reject the suggestion made in other jurisdictions that debtors should be required to complete a questionnaire on their assets when a writ is filed against them. Enforcement of such a requirement would be too difficult. We propose, however, that a debtor who wishes to inform his or her creditors voluntarily as to the extent of his or her assets—probably to establish that he or she cannot pay the debt—should be able to file a statement of assets with the sheriff.

There is one judicial process currently available to creditors for use in gathering information about the debtor's estate: the examination in aid of execution, although many creditors consider this process to be of limited usefulness. The main problem seems to be in getting the debtor to attend and submit to examination. We do not think much can be done to eliminate this problem, or to improve the usefulness of examination in aid generally. We do suggest that, as an alternative to an order requiring attendance or a contempt order where a debtor has not attended as required, the court be empowered to issue an order that the debtor be arrested for examination. We also suggest that the fact that an examination has been held should be recorded in the Enforcement Register so that other creditors can order a transcript.

We suggest also that a creditor be able to apply for an order requiring a third party who has information concerning a debtor's estate to reveal it to the creditor. In the case of information held by a municipality as to the interests in land owned by the debtor, a court order should not be required. The creditor should be given the information upon providing the municipality with a certified copy of the writ of enforcement and paying a reasonable fee.

CHAPTER 4
SEIZURE: THE GENERAL PROCESS

The seizure process is not in need of radical reform; however, there are several elements of it that should be adjusted to remove or reduce operational friction.

We believe that seizure should continue to be conducted exclusively by the sheriff and the sheriff's officers. Private bailiffs should not be used for enforcement seizures. The sheriff's authority to seize should be province wide, and not be limited by the bounds of the sheriff's judicial district. Creditors should be able to instruct any sheriff to conduct seizure, and the instructions should be assigned, where necessary, to the sheriff who can carry them out most efficiently. Written seizure instructions should continue to be required and should not be accepted unless the creditor issuing them has a subsisting writ of enforcement. The instructions should include sufficient information about the debtor or the debtor's assets to permit the sheriff to attempt seizure, seizure documents, and indemnification for the sheriff's fees and charges. Given the assurance fund that we propose in Chapter 11, however, no security for losses suffered as a result of the sheriff carrying out the instructions should be required.

A seizure should be considered effected when the sheriff has attended at the place where the property seized is located, has communicated the intention to seize to any person present and having custody of the property, and has identified the property on the notice of seizure. If the notice of seizure is not served on an adult person at the time of seizure, it should be served thereafter on the debtor. Such service should not be a required element of the seizure, and it need not be effected at the time of seizure, but the time for filing a notice of objection should not begin to run until such service is effected.

No enforcement seizure should be made at residential premises between 9 pm and 6 am. We would make no alteration to the present bailee's undertaking system, except to have the form disclose the consequences of breaching the undertaking.

We believe that a seizure process established according to these proposals would serve all the necessary functions. It would identify the property to be subjected to enforcement, and it would communicate that fact to the debtor. Further, given the recommendations concerning the binding effect of the writ discussed above, the position of third parties would be unaffected by seizure. Their position would depend on whether or not the writ of enforcement had been registered in the PPR—seizure would not alter that position at all.

To effect seizure, the sheriff should have the statutory authority to enter upon the debtor's premises or the non-residential premises of a third party; however, without consent, the sheriff should obtain a court order before entering a third party's residential premises to effect seizure of the debtor's property. Such an order should be granted if a reasonable likelihood is established that the debtor's property is on the premises.

If force is necessary to gain entry to effect seizure, the sheriff should have a court order authorizing the use of force in all cases, except where the premises are the non-residential premises of the debtor. The sheriff should have authority, by statute, to break any interior closure to gain access to the debtor's property, once access to the premises itself has been obtained.

We believe that the introduction of the PPSA permits a simple means of effecting seizure of "serial-numbered property". As an alternative to the general process, a creditor should be able to effect seizure of such property by registering the notice of seizure against the property in the PPR. The notice of seizure would then be served on the debtor.

We suggest a procedure that is modelled on garnishment be used where the debtor's property is in the hands of a third party. A notice could be served on the third party requiring him or her to deliver the property to the sheriff or otherwise make it available for seizure.

We recommend no substantial change to the present "objection to seizure" process, although we do suggest that the debtor be given information that would assist in understanding that process, and we propose that the debtor be required to state the reason for objecting on the objection form. We would also fix the period during which an objection can be accepted at 14 days after service of the notice of seizure. Any objection received after that time should be rejected unless otherwise ordered. We would not alter the arrangement whereby the creditor must take the initiative to have the debtor's objection determined.

As to removal, the sheriff should be obliged to remove seized property anytime after the seizure if properly instructed. The sheriff should have no discretion in this regard.

The sheriff should not be confined to any particular method of sale, but should use the method that will maximize the return. The creditor should suggest a method of sale when instructing on a sale, and the sheriff should give notice of the method selected to the creditor and debtor, who should then have 14 days before the sale in which to object.

If the sheriff cannot obtain a reasonable price for the property, the creditor should be able to apply to the court for an order permitting sale at whatever price can be obtained, except that no such order should be required if the value of the goods is less than $1000. The creditor should be eligible to be a purchaser, but if there is no competition for the creditor, the sale should not be concluded unless the price is reasonable and the debtor is given notice and the opportunity to object.

We would not alter the present law that the sale is subject to any defect in the title of the debtor. The sheriff's sale should not cleanse the title of any third-party interest; however, the sheriff should search for registered encumbrances and should inform prospective purchasers of these. Any purchaser who suffers as a result of a defect in the debtor's title should be entitled to compensation from the assurance fund. We believe that these reforms will eliminate any necessity for the price to be depreciated at the sheriff's sale because of uncertainty concerning the debtor's title.

CHAPTER 5
SPECIAL SEIZURE MECHANISMS

For some specific contexts, the general seizure process requires some modification. We consider contexts that we expect will arise frequently enough to justify special legislative treatment.

A. Enforcement Against Negotiable Instruments

Although it might be theoretically possible to permit enforcement against negotiable instruments to be effected by the service of a notice—similar to a garnishee summons on the party primarily liable on the instrument held by the debtor, we think that such a procedure would raise practical difficulties that could not be removed constitutionally in provincial legislation. Accordingly, we recommend that the general seizure process be used as the method of enforcement against negotiable instruments in the possession of the debtor.

As for realization on seized negotiable instruments, we think that the sheriff should have all the rights the debtor has to negotiate, present, collect or enforce the instrument. He should be statutorily constituted the agent of the debtor, with full authority to deal with the instrument in every way that the debtor could.

We would abolish the present provision of the Seizures Act that contemplates the sheriff paying or assigning seized negotiable instruments to the creditor because it does not include a means of determining the amount of the credit to be given to the debtor and does not accommodate the sharing principle. We think that the general "sale to creditor" recommendations in the previous chapter can be applied in this context.

B. Enforcement Against Securities

We define the category of securities so as to include all shares in corporations, as well as a wide variety of publicly traded interests, rights and obligations. For some purposes, all securities are treated alike. For other purposes, we distinguish between securities that are publicly traded, and securities that are not publicly traded. Because of the way that we define "securities", the latter category consists only of non-publicly traded shares.

So far as the method of actually effecting seizure is concerned, our main concern is to make sure that the mechanics of effecting seizure mesh with the mechanics of modern securities markets. In particular, we wish to take into account ongoing efforts to immobilize or "dematerialize" publicly traded securities and the prevalent separation of beneficial and registered ownership of such securities. Thus, we propose alternative methods for effecting seizure of securities. This would allow the sheriff to use a method of seizure that acknowledges the manner in which the debtor's ownership of the relevant securities is actually evidenced. Depending on the circumstances, seizure could be effected by any of three methods: 1) seizure of the relevant security certificate; 2) serving a notice of seizure on the issuer; or 3) serving a notice of seizure on a person, such as a broker, who holds the security for the debtor.

For the most part, our proposals do not distinguish between securities issued by Alberta and "foreign" issuers. The important question is whether or not effective steps can be taken in Alberta to assert practical control over the security; however, the court is empowered to make any order necessary to prevent anyone from being prejudiced by a conflict between the laws of Alberta and those of a foreign issuer's home jurisdiction.

Flexibility in the methods of seizure is not obtained at the expense of innocent third parties. A *bona fide* purchaser who obtains possession of a security certificate without knowledge that it is under seizure would be unaffected by a prior seizure. Similarly, a *bona fide* purchaser who acquires a security through a transaction that is settled through a securities clearing agency would be unaffected by a prior seizure, unless the purchaser knows at the time of settlement that the securities are under seizure.

While securities are under seizure, any dividends or other payments that would otherwise be payable to the debtor would instead be payable to the sheriff for distribution to enforcement creditors.

At present a serious impediment to effective enforcement against non-publicly traded shares is the restrictions on transfer that often attach to such shares. We conclude that the policy that creditors should be able to recover their debts out of the property of the debtor outweighs the policy that a corporation should control its membership. After generous opportunity has been given to a company to make some arrangement for the satisfaction of the debt without permitting sale of shares to a stranger, if satisfaction is not achieved, the sale should be valid notwithstanding corporate restrictions on share transfers.

We propose that, for the purposes of sale, the sheriff should be entitled to all the corporate financial information that the debtor is entitled to as shareholder, and also that the sheriff should be as free to make the same use of that information in effecting a sale as the debtor is.

C. The Debtor's Interests as a Secured Creditor

Security interests of a debtor offer two means of recovery—through diversion of the payments receivable from the debtor to the sheriff and through sale of the security instrument.

We suggest that, where the security is held in real property, the method of enforcement should be that applicable to interests in land. Where the security is held in a chattel, the method of enforcement should be that established by section 8 of the *Seizures Act*. In the new *Personal Property Security Act* regime, this procedure would require the filing of a financing statement by the sheriff for the enforcement in the PPR. The notice of enforcement and the objection documents would be served on the debtor.

The party obliged to make payment under the security instrument would be required to make payment to the sheriff instead of to the debtor on receipt of notice of the enforcement. If that party is in default of its obligations, the sheriff should be able to enforce the security just the same as the debtor could. The sheriff could sell the seized security interest using the same process that applies in the sale of any other seized property. The present requirement of a court order before such sale is redundant and should be abolished.

CHAPTER 6
LAND

The present process for enforcement against interests in land held by the debtor suffers such serious theoretical, procedural and practical inadequacies that there is rarely an enforcement sale of land; however, the writ of execution is generally registered at the land titles office to interfere with any attempt by debtors to deal with their land, and thus promote payment of the judgment to permit the completion of a land transaction. Our recommendations are intended to remove the impediments to enforcement against land while preserving the usefulness of the writ as an encumbrance on the debtor's interests in land.

To eliminate uncertainty as to whether or not particular interests in land are subject to enforcement, we recommend that it be established expressly in the new legislation that all interests in land are exigible, whether legal, equitable, registered, unregistered, or technically classified as interests in land or interests in personalty.

We recommend also that a distinction be made between the process leading to enforcement sale of land and the process by which land is encumbered by the writ of enforcement. The latter should continue to operate as it does at present — the creditor registers the writ in the general register (or, when that is abolished pursuant to as yet unproclaimed amendments to the Land Titles Act, against the title). But where the creditor wishes to have the land sold by the sheriff, the process should be commenced by registering and serving a "Notice of Sale", containing details of the proposed sale.

The three existing procedural restrictions on the enforcement against land, the requirement of a *nulla bona*, the delay of one year from registration of the writ, and the denial of land enforcement costs where the debt is eventually paid by some means other than sale of the land, should all be abandoned. In place of the one-year delay, we propose a six-month delay from service of the notice of sale. During that period, which could be enlarged or abridged, applications regarding exemptions and other process concerns could be made, and the debtor would have time to arrange for payment of the debt to avoid loss of the land.

As in the case of other enforcement sales, we propose that the sheriff should be able to use whichever method he considers most likely to produce the best return. The creditor would be given an opportunity to propose a method, and all parties would have a right to challenge the method chosen by the sheriff.

Instead of the sheriff having to obtain an order confirming sale when a buyer is found, he would give notice of the proposed sale to the interested parties. The sale would be confirmed by default unless an interested party applied to the court for an order requiring the sale not to be concluded.

In this chapter, we consider the effect of the Dower Act on enforcement sales and conclude that, contrary to the present law, a dower consent ought not to be required for an enforcement sale of a Dower Act homestead. Enforcement sale should bring the contingent life interest of the debtor's spouse in the homestead to an end.

We also consider enforcement against joint interests in land, and we conclude that, consistent with our recommendation that all interests in land should be exigible, it should be confirmed that this applies to jointly held interests. We recommend that the right of survivorship, which is part of the concept of joint tenancy, should prevail over the binding effect of the writ, so that on the death of the debtor, the non-debtor joint tenant would take the entire interest in land free of the writ.

As for unregistered interests in land, we propose that they be subject to the same procedure as registered interests where the land in question is patented. Where the debtor holds an interest in unpatented land, the enforcement process should be determined by the court on application.

CHAPTER 7
GARNISHMENT

Garnishment is probably the most effective enforcement process existing at present. Its mechanics operate relatively efficiently. Accordingly, we do not propose fundamental alterations to those mechanics, and garnishment will still be available upon the filing of an affidavit establishing the debt to be attached. By way of changes: we propose only that the sheriff take over the clerk's present role; that the provisions relating to garnishment be placed in the enforcement statute, as opposed to the Rules of Court; that the debtor be given an express right of objection, which is only implied at present; and that compensation for the garnishee be established by regulation, with a minimum of $25 per payment in.

We recommend the elimination of some of the present restrictions on the scope of garnishment. Probably the most significant proposal that we make in this regard is that future obligations that might reasonably be expected to arise out of an existing legal relationship between an enforcement debtor and a third party should be subject to garnishment.

Much of the chapter is given to discussing the details of this proposal. We envision the mechanics of garnishment of future obligations working in the same manner as garnishment of a current obligation. The garnishee would be expected to respond indicating whether or not he or she acknowledges the alleged legal relationship, any contingencies attaching to the obligation, and when payment can be expected to be made. Even where the garnishee denied the legal relationship, the summons would remain in effect. A garnishee who failed to respond would be liable for judgment just as in the case of a current garnishment. A summons would remain in effect for one year, but could be "renewed" at any time before the end of the year.

Other details discussed include the adjustment of the amount bound by a continuing garnishment when there is a change in the total of the subsisting writs of enforcement; a discretionary exemption available to the debtor to preserve the source of the future entitlement; the garnishee's right of set-off, the effect where the garnishee holds insurance in respect of the future entitlement; and payments into court in litigation between the debtor and the garnishee regarding the future entitlement.

We also propose that the scope of garnishment be enlarged to include:

a) debts owed to the debtor and another jointly, subject to several provisions intended to protect the non-debtor joint obligee from prejudice;

b) conditional debts, with the court having the power to waive conditions that can be waived without prejudice to the garnishee; and

c) garnishment of funds in court in replacement of the present "stop order" procedure or an application under section 7 of the *Execution Creditors Act*.

Our previous conclusion that garnishment of wages should be retained is confirmed. To reduce the inconvenience to employers, we propose that a garnishee summons of wages earned in the current pay period should be caught only if the garnishee summons is served at least 10 days before the pay-day. If the pay period is less than 10 days, then service of the summons five days before the pay-day would be required.

CHAPTER 8
COURT-ORDERED ENFORCEMENT

Although the general enforcement processes of seizure and garnishment, as modified by our recommendations, would have much greater scope than they have at present, there is still a need for the court to have jurisdiction to design an enforcement procedure for situations where the general procedures are ineffective.

Probably the most frequent context in which this will occur is that of equitable receivership. We recommend the continuation of that remedy, but with significant simplification of the principles governing the exercise of the discretion to grant it. The remedy should be available regardless of the nature of the asset in respect of which it is sought since all assets are exigible except those exempted deliberately. Further, the remedy should be available even in the absence of an impediment to the employment of a legal enforcement process. The only question should be whether or not it is just and convenient to order the receivership. We suggest several factors that a court can take into account when determining whether or not it is just and convenient in a particular case.

Only competent and willing persons whose integrity is warranted should be appointed. The sheriff could be the appropriate receiver in some cases. The duties and powers of the receiver should be set out by the court, but the statute should include a non-exhaustive list of powers and a minimum list of duties.

There might be cases where the general processes are ineffective but receivership is inappropriate. The court should have the power in such a case to order an enforcement process to suit the situation.

Where enforcement is frustrated by the debtor or a third party, the court should have the power to order that the debtor co-operate to the extent that it is in his or her power to do so. Such an *in personam* order would be enforceable using the court's contempt powers.

The *Imperial Judgments Act* charging order remedy is redundant to existing enforcement remedies and the ones recommended in this report and should be abolished. As sequestration is not used in an enforcement context in this jurisdiction, the report makes no recommendation with respect to it.

CHAPTER 9
EXEMPTIONS

The principle of universal exigibility contemplates deliberate exceptions, and this chapter discusses these exceptions.

The policy foundation for the exceptions is that the operation of enforcement processes should be restrained to the extent necessary to protect debtors' present ability to maintain themselves and their families, to protect a measure of security that they will be able to maintain themselves and their families in the future, and to foster restoration of debtors' personal economy. To accomplish this, it is necessary to preserve from enforcement certain basic necessities, property a debtor uses to earn a livelihood and a portion of a debtor's income from employment.

In this chapter, we review the entire structure of enforcement exemptions and propose certain refinements. For the most part, we do not suggest alteration of the basic structure.

Basic Necessities:

Particularly, we deal with the exemption of food, clothing, shelter, furniture, a motor vehicle, medical and dental aids, and sentimental memorabilia. Our most significant proposals in this area relate to the shelter exemption and the motor vehicle exemption.

As for shelter, we consider in detail several criticisms of the present shelter exemption and conclude that, while most of them do not justify any change, a few do. We would confine the rural shelter exemption to debtors who gain the primary portion of their livelihood from farming the land on which the shelter is located. In the case of the urban shelter exemption, we suggest that the proceeds of sale of land, which would be exempt if the debtor's equity did not exceed the monetary limit of the exemption, should themselves be exempt up to the amount of the monetary limit. Further, we suggest that the monetary limit of the exemption should not be effectively doubled where the property is co-owned by the debtor and another, as is now the case, but rather that the limit should be reduced so that it is proportional to the debtor's interest.

We observe that almost everyone who has a motor vehicle would find it difficult to carry on without it and propose that, for exemption purposes, a motor vehicle be considered a basic necessity. We suggest that the monetary limit applicable to this exemption be $5000.

Livelihood:

The present livelihood exemption provisions are focused mainly on farmers. Although we suggest only minor changes to the substance of the farm exemptions, we propose that the legislation first focus on a general livelihood exemption and then deal with exemptions specifically intended for farm debtors.

We propose that a general livelihood exemption of $10,000 worth of property required to earn a livelihood be substituted for the present tractor, motor vehicle, professional books and general tools of the trade exemptions.

Income:

We propose that the present minimum income exemption be replaced by a percentage income exemption. More specifically, we propose that there be a minimum income exemption of $800 per month for a single debtor, adjusted according to a formula where the debtor has dependants. We suggest that 50% of the debtor's net income in excess of this minimum, and up to a maximum level, be exempt from enforcement. For the purposes of this exemption, "net income" would mean that remaining after statutory deductions had been made. The maximum would be triple the minimum.

We consider the effect of these proposals on the garnishee and propose that a straightforward "return form" be designed for use by the garnishee in calculating the exemption. A sample return form is included in the chapter.

Exceptions to Exemptions:

The present exemptions legislation creates a number of exceptions to exemptions from enforcement. We review all these and propose the abolition of some that we conclude are out of date or otherwise inappropriate. We recommend the continuation of qualified exceptions for debts arising from criminal activity, corporation and partnership debts, and alimony and maintenance debts.

Operational Issues:

We consider several operational features of the exemption provisions as well. We conclude that exemptions should exist as of right and not be dependent on the debtor claiming them. Further, a debtor should not be able to waive his exemptions contractually. We propose that the procedure ordained by the court in *Carmar Holdings* v. *Harpe* be incorporated into the statute. We suggest that the circumstances as they exist at the time the issue of exemptions is being determined should be the relevant ones. We propose that, where property that would be exempt except that it is worth more than a monetary limit is sold by the sheriff, that portion of the proceeds that equals the monetary limit should be paid to the debtor and should remain exempt in his or her hands, assuming that he or she does not mix it with other funds, for 60 days. In the case of land, we suggest that the "extended exemption" should last for six months.

So that the net effect of the recommendations that we make might be more easily appreciated, we include a table comparing the existing exemptions provisions with the ones that we propose.

CHAPTER 10
DISTRIBUTION OF PROCEEDS

The *Execution Creditors Act* currently requires that the proceeds of enforcement be shared among all creditors who have a subsisting writ of execution filed with the sheriff. In this chapter, we consider the merits of this policy by comparing it to the main alternative — the common law first come, first served priority system. We conclude that the sharing principle is superior on a policy basis and recommend that it be retained.

Also, we recommend several reforms to the implementation of the sharing principle. First, we propose that it should be applied to all funds received by the sheriff because he holds a writ of enforcement. At present, the proceeds of some enforcement processes can escape the sharing regime; however, funds should not be shared if they do not come into the sheriff's hands. Accordingly, we recommend that there be no sharing of direct payments to a creditor. We support the continuation of the concept of "subsisting writs of enforcement", but we propose that the entitlement to share no longer be confined to those creditors who have filed writs with the sheriff making the distribution. Future distributions should be made on a province-wide basis.

We propose the abolition of three features of the present legislation. First, we suggest that the "certificate procedure", whereby a creditor who has not obtained a judgment can become entitled to share through a summary procedure, be abandoned. Generally, it is not used because it is procedurally complicated and does not provide any significant time-saving over the normal route to joining the sharing group. We propose also that the present 14-day "grace period", by which a distribution is delayed for 14 days after the distributable fund is received, during which time other creditors can join the sharing group, be abolished. We conclude that this 14-day deadline is no less arbitrary than the day the distributable fund is received. Finally, we propose that a little-used provision that contemplates a share being reserved for a creditor who is delayed in getting to judgment be abolished.

We propose that the distribution provisions should bind the Crown expressly and should be applied where the debt owed to the Crown is not entitled to some preference arising by virtue of statute or crown prerogative.

The present sharing system is criticized heavily because it does not reward the diligent creditor. We agree with this criticism, and we propose that a preference payment should be made out of the enforcement proceeds to the creditor whose diligence resulted in the distributable fund being obtained. We suggest that the "active creditor" should be entitled to the taxable costs of the successful enforcement process and to a further 15% of the remaining fund. Distributable shares would be calculated after the special entitlements of the active creditor had been deducted from the fund.

The application of the sharing principle to enforcement of land is given specific attention. At present, it is not clear that sharing applies to such proceeds. We recommend that sharing should apply to the proceeds of enforcement against land and to the distribution of excess proceeds of any other judicial sale of land where there are writs of enforcement on title. We propose that the proceeds should be first distributed among the title encumbrancers according to land titles priority principles, and then the funds allocated to writs of enforcement should be shared among the holders of all subsisting writs of enforcement, regardless of land titles priority and of whether or not they are registered at Land Titles.

We propose also that an equivalent procedure be used where chattels that are subject to chattel security other than writs of enforcement, in addition to writs of enforcement, are sold judicially.

CHAPTER 11
COMPENSATION FOR LOSS

Mishaps can and do occur in the enforcement process. These mishaps can cause pecuniary injury to enforcement debtors, enforcement creditors or third parties. In this chapter, we propose the creation of an assurance fund as the exclusive source of compensation for injuries caused by such mishaps. The assurance fund would be funded by a levy on creditors imposed at the time a writ is filed in the Enforcement Registry.

Third persons who suffered pecuniary injury as the result of the accidental seizure, detention or sale of their property would be entitled to compensation from the fund. Enforcement debtors who suffered pecuniary injury as the result of a sheriff's or creditor's non-compliance with a requirement of the new statute should also be entitled to compensation. Finally, enforcement creditors who suffer pecuniary injury because of the negligent performance or non-performance of any of the sheriff's duties should also be entitled to compensation.

Injured persons would be required to look to the assurance fund for compensation, but in certain circumstances the latter would be entitled to compensation from the party actually responsible for the injury. The fund would be entitled to indemnity from the Crown if the loss was attributable to negligence or deliberate misconduct within the sheriff's office. A creditor whose instructions caused someone to suffer a loss that should have been foreseen by the creditor would be required to indemnify the fund. Similarly, a creditor whose neglient or deliberate failure to register required information in the Enforcement Registry was the cause of a compensable loss would be required to indemnify the fund. Generally, creditors would not be required to provide any security for their potential liability to indemnify the assurance fund.

Although this chapter is concerned primarily with the matter of how to compensate injured parties for loss that does occur, it contains one proposal designed to reduce the potential for such loss. It is proposed that where a sheriff seizes property in which he has reason to believe a third party might have an interest, the sheriff must serve notice of the seizure on the third person. The third person must then assert a claim to the property within a defined period, or else be estopped from asserting any claim for damages resulting from the seizure or sale of the property. If the third person does assert such a claim, the instructing creditor (or failing the instructing creditor, any other enforcement creditor) must then apply to the court for a determination of the claim. If no application is made to the court by a creditor within a defined period, the sheriff would be required to release seizure.

PART 2

REPORT

CHAPTER 1
INTRODUCTION

A. Reform of the Law of Creditors' Remedies

(1) The Need for Reform

It is a fundamental precept in our society that individuals should honour the obligations that they have undertaken to other individuals. Our civil legal system exists to support that precept, and it provides processes by which the scope of obligations are determined and then enforced. The quality of these processes is measured in terms of justice and efficiency, just and efficient processes for both the determination and enforcement of individual obligations are fundamentally essential to the health of our society.

In this project, the Institute has concentrated on the processes that exist for the enforcement of judgment debts. It is essential that these particular processes operate with the highest level of justice and efficiency, for without a just and efficient system for the enforcement of judgment debts, public respect for and confidence in the judicial system is endangered. What use is a judicial system that purports to resolve a dispute if the resolution it determines cannot be implemented effectively? Moreover, a just and efficient enforcement system is necessary if credit is to continue to play its fundamentally important role in the operation of our commercial system.

Notwithstanding their central importance to the integrity of the judicial system, judgment enforcement procedures have not been maintained in good operating condition. In his comprehensive text, *Creditor-Debtor Law in Canada*, Professor C.R.B. Dunlop observes:

> . . . it is undeniable that the present system of creditors' remedies law in Canada is in urgent need of reform. In most provinces, the law governing debtor-creditor relations is a patchwork of English and Canadian legislation and judge-made rules which do not fit together into a comprehensible or workable pattern. Much of the law is out of date, particularly when viewed against a backdrop of the economic and social changes which have occurred in recent years. The creditors' remedies system is thus perceived as operating unsatisfactorily by both creditors and debtors, one result being that creditors will do everything possible to collect their debts without resort to law. The system of judicial creditors' remedies often fails to accomplish much more than to

> create hardship for low-income debtors without doing much to satisfy the claims of their creditors.[1]

Although the need for reform has long been recognized, improvements to the system have been slow to materialize. The last great period of reform in England and Canada ended well before the close of the nineteenth century, and no major changes have taken place since, at least not in this country. In the last 25 years, reform of the law of creditors' remedies has frequently been on the agenda of the world's law reform agencies, and many reports have been published in the area. The legislative response to these reports has been considerable, though legislatures have generally been slow to implement the recommendations.

Apart from the present project, the law reform movement in creditors' remedies has hardly touched Alberta. Legal changes that have occurred since the creation of the province have been largely patchwork in nature, and have dealt with specific problems without taking into account the overall design of the system. A major and comprehensive overhaul of the entire system of money judgment enforcement is long overdue. Moreover, reform attention is required not only at the technical level but also at the level of more basic policy issues.

As with all other areas of the law, the policies upon which the law of judgment enforcement is based attempt to balance the competing and conflicting interests of various parties. The creditor's interest in recovering the debt and, for that purpose, in having access to the debtor's assets must be balanced with the debtor's interest in maintaining his economic viability and in being free from unreasonable collection practices. In addition, society as a whole has an interest in ensuring that the process is conducted in an orderly fashion, that the integrity of commerce is not prejudiced, and that the debtor's ability to maintain himself and his family is not so affected that society must take over their maintenance. The reform of the enforcement system involves the reassessment of the details of the existing law to determine whether they individually and collectively achieve the optimum practical compromise of these competing interests and goals.

As to the specific procedures, substantial technical restructuring and co-ordination is required. At present, the enforcement procedures are set out—often unclearly—in a great variety of statutes and in the common law. There is considerable unnecessary inconsistency in the operation of processes used against different types of assets. The drafting is often archaic, and the organization is often obscure. In short, the enforcement system suffers greatly from its piecemeal development, the lack of a consistent design, and the absence of a rationalized exposition.

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[1] C.R.B. Dunlop, *Creditor-Debtor Law in Canada*, (Toronto: Carswell, 1981), at 13.

(2) The Reform Project

The Institute has had various aspects of creditors' remedies under consideration for many years. Assuming that almost all creditors try to collect debts personally or through an agent before commencing an action, we began with a review of the legal controls over extrajudicial collection practices. Our report on this subject was published in 1984.[2]

Before proceeding to the reform of the law of judicial debt collection, we undertook an empirical study of the use of the existing enforcement remedies. Our objectives were:

a) to discover how many plaintiffs who sue and obtain money judgments use any enforcement remedies;

b) to find out which remedies are commonly used and which are rarely initiated;

c) to discover how the remedies actually operate in practice; and

d) to determine the measure of success that judgment creditors are able to achieve using the existing remedies.

The results of this study were published in 1986.[3]

We then turned our attention to reform of the system of enforcement of money judgments. Later in 1986 we published a report for discussion,[4] in which we described the present system of creditors' remedies, identified the aspects of the system that are in need of reform, and set out our approach to reform with many specific tentative recommendations.

We received considerable response to this report and, shortly after it was published, conducted a workshop at which the report was discussed by people closely involved in the operation of the enforcement system.

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[2] Institute of Law Research and Reform, Report No. 42, *Debt Collection Practices* (Edmonton: ILRR, 1984). The Institute changed its name to the Alberta Law Reform Institute in April, 1989.

[3] Institute of Law Research and Reform, Research Paper No. 16, *The Operation of the Unsecured Creditors' Remedies System in Alberta* (Edmonton: ILRR, 1986) [hereinafter Research Paper].

[4] Institute of Law Research and Reform, Report for Discussion No. 3, *Remedies of Unsecured Creditors* (Edmonton: ILRR, 1986) [hereinafter Report for Discussion].

In 1988, the work on one aspect of the enforcement system was completed and we published a report on prejudgment remedies for unsecured claimants.[5] This report discussed existing prejudgment remedies, such as attachment of personal property of absconding debtors, prejudgment attachment of debts, and Mareva injunctions. We concluded that these processes do not provide an effective, coherent and fair system of provisional relief. We recommended that all existing prejudgment remedies be replaced with a single process, which we called an "attachment order". Such an order could be granted only on application to a judge, who would have a controlled discretion as to whether or not to grant it and as to its terms. Our report contained a detailed description of the types of legislative provisions that we considered appropriate for the creation and regulation of this prejudgment remedy.

Since the completion of the report on prejudgment remedies, our attention has been focused on the reform of the post-judgment collection processes available to judgment creditors. Our recommendations for the reform of that area are contained in this report.

B. The General Principles of Reform

In our Report for Discussion mentioned above, we identified several principles that should be applied to the reform of the creditors' remedies system, and we have applied most of those principles in the development of the recommendations contained in this report. We discuss many of them in the appropriate chapters of the report, but here we wish to set out the more important general principles.

(1) Universal Exigibility

At present, there are classes of property for which no adequate enforcement process exists. A fundamental aim of this reform project, therefore, is to remedy this deficiency. All the property of a debtor should be subject to enforcement, regardless of its form or character, excepting only property that has been deliberately excluded from enforcement. No class of assets should be "exempt" from enforcement for the lack of an enforcement procedure.

The application of this principle is manifested in recommendations intended to improve the efficiency of the seizure process and in the improvement and expansion of the garnishment remedy. Universal exigibility is also behind our recommendations regarding enforcement against specific types of property, such as land, negotiable instruments, corporate shares and the debtor's interests as a secured creditor. Much of this report is devoted to the discussion of the details of these specific enforcement processes.

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[5] Institute of Law Research and Reform, Report No. 50, *Prejudgment Remedies for Unsecured Claimants* (Edmonton: ILRR, 1988) [hereinafter *Prejudgment Remedies*].

We have not attempted, however, to develop specific enforcement processes for all conceivable types of property that a debtor might own. We have given specific attention only to those types of property that a debtor would most commonly possess. For the forms of property not specifically considered, we have recommended "court-ordered enforcement". We suggest that where the debtor owns exigible property for which the standard statutory enforcement processes are for any reason unsuitable, the creditor should apply to the court for an order establishing the process to be followed in the particular case.

We think that this combination of off-the-rack and tailor-made enforcement processes will achieve the goal of universal exigibility.

RECOMMENDATION 1:

UNIVERSAL EXIGIBILITY

All the property of a judgment debtor should be subject to enforcement regardless of its form or character, excepting only property that has been excluded deliberately from enforcement. No property should be "exempt" from enforcement for lack of an enforcement procedure.

(2) Just Exemptions

The deliberate exceptions contemplated within the principle of universal exigibility should be sufficient to permit debtors to maintain themselves and their dependents at a reasonable standard and to have reasonable security that they will be able to continue to do so in the future. In Chapter 9 — Exemptions from Enforcement, we review the existing system of exemptions and assess the degree to which it is consistent with this principle. We find that in a few areas it falls short of the goal and recommend improvements, particularly in the area of wage exemptions.

RECOMMENDATION 2:

JUST EXEMPTIONS

The deliberately exempted property should be sufficient to permit debtors to maintain themselves and their dependents at a reasonable standard and to have reasonable security that they will be able to continue to do so in the future.

(3) The Sharing Principle

The enforcement processes should continue to operate for the benefit of all creditors. There should be no priority among judgment creditors in the distribution of the proceeds of enforcement. Proceeds should be shared *pro rata*. In Chapter 10 — Distribution of Enforcement Proceeds, we discuss the merits of this principle in considerable detail. Our recommendation regarding the sharing principle is made in that chapter, along with proposals for its more effective implementation.

(4) Creditor Initiative

The enforcement system should continue to be creditor driven. In our Report for Discussion, we described and discussed the concept of a government officer responsible for the collection of judgment debts, which has been recommended in several other jurisdictions. We recommended tentatively that such an approach not be adopted in Alberta, and that recommendation was endorsed almost universally by those who responded to our Report for Discussion. We do not think it necessary to repeat the report discussion that led us to this conclusion, we wish merely to repeat our recommendation that the enforcement system continue to be creditor driven.

RECOMMENDATION 3:

CREDITOR INITIATIVE

The enforcement process should rely on the initiative of the creditor for its operation. The suggestion, made in other jurisdictions, of an enforcement system operated entirely by a court or government official without specific instructions from creditors should not be adopted in Alberta.

(5) Coherence and Consistency

One of the chief criticisms of the present system is that it is a hodgepodge of statutory and judicial rules and procedures. As the law has developed in this area, the logical ordering of the provisions has not been given a high priority. The system is far from user-friendly. One of our objectives has been to recommend an enforcement system that is coherent, logical and internally consistent.

The system should be established by one piece of legislation that is logically arranged and describes enforcement processes in a manner that can be understood by people who are affected by it and not just by their lawyers. The legislation should be free of the types of "mechanical slips" that are common at present. The various processes within the system should be consistent with each other unless there is good reason for inconsistency. We have attempted to meet these standards in the recommendations contained in this report and the accompanying draft statutory material.

RECOMMENDATION 4:

ONE STATUTE

The enforcement of money judgments should be governed by one statute that describes the system of enforcement and the various processes, and the procedures that are a part of it, in consistent, coherent and logically ordered terms.

(6) Judicial Supervision

The occasions when judicial attention to a specific enforcement case is required should be minimized. The legislation should establish the result that will apply in the ordinary situation—the "default" result. Specific judicial attention should be required only where the default result is inappropriate or where one party considers it to be so.

It has not been possible to adhere to this principle completely. On a few occasions, we have recommended that a court application be required in every case where certain circumstances arise. One example has already been mentioned—where the property that enforcement is sought against is not one for which a statutory enforcement process exists, the court must be involved in the design of the specific enforcement process to be used. Another example is where the debtor objects to seizure. A court application will continue to be necessary to determine the validity of the objection.

Furthermore, although we expect it to be the exception that an enforcement process requires an application to the court, we do think that persons concerned with the operation of enforcement processes should have easy access to the courts to obtain directions with regard to any matter that might arise in the course of enforcement. We intend that judicial supervision be available whenever it is required, but that the occasions when it is a required step in a process be minimized. Obviously, we intend that the statute should govern the enforcement process. It is not intended that the court would have the authority to override the operation of the act in a particular case.

RECOMMENDATION 5:

JUDICIAL SUPERVISION

The various enforcement processes should be designed to minimize the occasions when an application to the court is required; however, the processes should also be designed to permit easy access to the court whenever judicial supervision of a specific aspect of enforcement is required. All parties should have the right to seek the direction of the court on any point that arises in the course of enforcement.

C. Two Specific Recommendations

In our Report for Discussion we also made some more specific recommendations, which it will be convenient to refer to here.

(1) Imprisonment for Debt

The Report for Discussion noted that imprisonment for debt has been practically abolished in Alberta, at least as a remedy for trade creditors.[6] We stated that "the present policy prohibiting imprisonment for debt as a remedy to enforce money judgments is sound and should be continued."

We affirm this principle, and in so doing wish to emphasize the distinction between imprisonment as a remedy to enforce money judgments and as punishment for disobedience of a court order that might relate to the enforcement of a money judgment. Imprisonment as a punishment for disobedience of a court order that requires attendance at an examination in aid of execution is within the second class, so is imprisonment as a sanction for disobedience of an *in personam* court order that requires the debtor to yield specific property to the sheriff for enforcement—a remedy that we recommend in Chapter 8—Court Ordered Enforcement.

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[6] *Maintenance Enforcement Act*, s. 24. Imprisonment is one of the remedies open to the court upon the default of a maintenance debtor.

RECOMMENDATION 6:

IMPRISONMENT FOR DEBT

The existing policy of prohibiting imprisonment as a remedy to enforce money judgments should be continued.

(2) One Post Judgment Remedy

In our Report for Discussion, we tentatively recommended:

> that all existing remedies for the enforcement of money judgments should be abolished and replaced by one new remedy, to be called the enforcement order. This new process will be designed to catch all real and personal property of the judgment debtor, including debts owing to him or her.

The evolution of that recommendation into those contained in this report has involved considerable change. Indeed, it was recognized at the time of our Report for Discussion, and has become clearer as we have worked out the details of our proposals, that it is necessary to maintain distinct processes for use in respect of different categories of assets. The idea of a single enforcement process has evolved into a recommendation that all enforcement processes be commenced by one document, the writ of enforcement, which would be issued by the clerk to the sheriff, and that all enforcement activity be carried on through the sheriff's office.

In our Report for Discussion, we suggested that "one remedy" would help avoid the present problem whereby some property falls into the crack between the two main enforcement processes—seizure and garnishment. In this report, we believe that we have addressed that problem in another way—by the expansion of the scope of the main remedies and the development of court-ordered enforcement for use where the standard remedies are not useful.

D. Organization of the Report

The report has been organized according to a logical progression. We begin with the document by which the enforcement process is commenced, the writ of enforcement. We discuss its legal effect on the debtor's assets—the binding effect of the writ—and the technical aspects of its issue.

We deal next with discovery of the debtor's assets, and in particular the process of examination in aid of enforcement.

The report then discusses the enforcement processes that can be undertaken pursuant to the writ of enforcement: seizure, garnishment and court-ordered enforcement. In the case of seizure, we consider the application of the process in several contexts where its operation is at present less than satisfactory: the context of negotiable instruments, corporate shares, and chattel security agreements. We give specific attention to the process of enforcement against land. In the case of garnishment, we recommend significant expansion of the scope of the remedy to include "future entitlements", thus releasing garnishment from the restrictions of the present "debts due and accruing due" formula. We also propose a "continuing garnishment" process for use where the debtor's entitlement is one that recurs periodically, such as wages. In the chapter on court-ordered enforcement, we suggest improvements to the present remedy of equitable receivership and consider several other remedies for which specific court attention is required.

We then deal with the subject of exemptions from enforcement. Here, we propose significant reforms with respect to income exemptions and other existing exemptions and suggest changes that, in our view, will substantially improve the organization and clarity of the system.

The distribution of the proceeds of enforcement is the next subject considered. We weigh the merits of the sharing principle against the merits of its alternatives and recommend its retention. Also, we make several proposals that we believe will result in a more effective implementation of that principle.

Finally, the report deals with the compensation of those who suffer damages as a result of the operation of the enforcement system.

In the accompanying volume, we present a draft statute that sets out our recommendations in statutory form. This is accompanied by technical notes. The purpose of the draft statute is to show that it is possible to convert our recommendations into that form. Some readers might find it easier to acquaint themselves with our proposals by reading them in statutory form. If our recommendations find favour with the government, we hope that the draft statutory material presented with this report will provide the government's legislative drafting staff with a useful basis for their work.

Several subjects that are not dealt with in this report are in obvious need of examination and reform. Among these are priorities among unsecured creditors, in particular crown priority, and the impeachable transactions—fraudulent conveyances, preferences and bulk sales. Those who responded to our Report for Discussion frequently noted that reform attention could usefully be given to these matters.

We have given attention elsewhere to bulk sales,[7] but the priorities and fraudulent conveyances and preferences are subjects that it has been impossible for us to study in this project and must be left for future attention.

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[7] Alberta Law Reform Institute, Report No. 56, *The Bulk Sales Act* (Edmonton: ALRI, 1990).

CHAPTER 2
THE WRIT OF ENFORCEMENT

A. The Present System — The Writ of Execution

The judgment creditor usually commences the enforcement process by having the clerk of the court issue a "writ of execution". The form of the writ is prescribed by the Rules of Court.[8] Formally, the writ is a command issued in the name of the Queen, directed to the sheriff of a judicial district, reciting that a judgment has been entered, and commanding the sheriff to "make" the amount of the judgment from the goods or lands of the judgment debtor.[9]

The writ of execution serves four main purposes. First, it communicates to the sheriff that the creditor has obtained judgment and the particulars of the judgment.

Second, the writ authorizes the sheriff to accept and comply with seizure instructions received from the creditor. The issuing of a writ is not essential for all enforcement processes. It is only required for the enforcement process that is undertaken through the sheriff's office: seizure. The creditor can undertake other enforcement activity, such as garnishment and equitable receivership, without having a writ issued.[10]

Third, the writ entitles the creditor to share in the distribution of the proceeds of all enforcement activity against the debtor pursuant to the terms of the *Execution Creditors Act* ("ECA").

Finally, the writ "binds" the goods of the debtor located within the judicial district of the sheriff to whom it is delivered from the time of the delivery.

(1) The Binding Effect of the Writ

The "binding" effect of a writ is set out in section 4 of the *Seizures Act*. This section has recently been significantly amended with the coming into force of the *Personal Property Security Act* ("PPSA"). The effect of the PPSA on the binding effect of the writ is discussed in some detail below. For the moment, however, we will concern ourselves with the part of section 4 that is basically the same now as it was before the PPSA came into force. It reads:

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[8] Rule 362, and Schedule A, Form F.

[9] The sheriff cannot obey the command contained in the writ until he gets the written instructions and other documentation that the *Seizures Act* requires the creditor to provide.

[10] By virtue of the ECA, however, if there are other writs outstanding against the debtor, the creditor who instructs garnishment will not share in the proceeds unless he has delivered a writ to the sheriff.

> (1) A writ of execution, from delivery of it for execution to a sheriff, binds the goods of the judgment debtor situated within the judicial district of that sheriff....

The rest of section 4 goes on to explain and limit the binding effect of a writ. But even in the part of section 4 set out above, two significant limitations on the binding effect of a writ can be observed.

First, the effect is confined to the "goods" of the debtor.[11] It has been held that "goods" includes only property that was exigible at common law. This was the debtor's "tangible" personal property, ie, property physically capable of being seized and removed from the debtor's possession. Property that was not exigible at common law but has been made exigible by statute, for example, choses in action and corporate shares, is not bound by the writ.[12] Debts owed to the debtor are not bound until a garnishee summons is served on the garnishee.[13] The debtor's interests in land are not bound until the writ is registered at the Land Titles Office in the General Register.[14]

Second, there is a territorial limitation on the binding effect. Only the debtor's goods in the judicial district of the sheriff to whom the writ is delivered are bound. To affect the assets of the debtor in any other judicial district, it is necessary for the creditor to issue a second writ, usually called an "alias" writ,[15] directed to that sheriff. For province-wide coverage, there being 12 judicial districts, 12 writs of execution would be required.

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[11] There formerly was no definition of goods in the *Seizures Act*, but now there is, in s. 1(d.1). It reads:

> "goods" means tangible personal property other than chattel paper, a document of title, and instrument, a security and money, and includes fixtures, growing crops and the unborn young of animals, but does not include timber until it is cut or minerals until they are extracted.

This definition is quite similar to the common law definition of "goods" described in the text.

[12] *Johnson* v. *Pickering* [1908] 1 K.B. 1 (C.A.).

[13] Rule 471.

[14] *Land Titles Act*, s. 122. Once s. 17.3 of the *Land Titles Act* comes into force, registration in the General Register will no longer be possible: see *infra* at 43, 44.

[15] The term "alias" writ is not used in the Alberta Rules of Court. Rule 346 permits a judgment creditor to issue one or more writs of execution. The term "alias" writ originally meant a second writ issued to the same sheriff when the first had been lost or ignored.

The binding effect of the writ does not involve any change in the ownership of the bound goods. In *McPherson* v. *Temiskaming Lumber Co.*,[16] the Privy Council described the effect as follows:

> . . . the right of an execution creditor in no case interferes with the proprietary interest of the execution debtor, except to the effect that, while the execution debtor is free to deal with his property, the property so dealt with remains subject to the rights of the execution creditor therein; these last remain unaffected and unimpaired.

Professor Dunlop's description of the effect is simple and clear:

> What is meant by the "binding" effect of the writ is that it gives the sheriff the right to seize the goods in the hands of the debtor and also in the hands of any transferee . . . . The fact that the debtor owned the goods he purported to sell does not matter; the execution creditor can follow and seize them in the hands of the new owner. "That is his right, as it is the purchaser's misfortune."[17]

It is useful for our purposes to think of the binding effect of the writ as having two aspects. First, it renders the debtor's goods liable to seizure. Second, it places a cloud on the debtor's title to the bound goods, a cloud that goes with the goods if they are transferred to another. We shall sometimes refer to this as the writ's "cloud effect".

The cloud does not follow the goods in all situations, however. The harshness of the common law effect of the writ on innocent purchasers from the debtor was considered sufficiently unjust that protection for such purchasers was added by statute in 1856.[18] The binding effect was watered down, so as not to affect a purchaser who acquired title from the debtor in good faith, for valuable consideration and without knowledge that the writ had been delivered to the sheriff for execution and that it remained in his hands unsatisfied.[19] The same

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[16] [1913] A.C. 145 (P.C.).

[17] Dunlop, supra note 1 at 148, citing *Ross* v. *Dunn* (1899) 16 O.A.R. 552.

[18] *Mercantile Law Amendment Act*, 1856, (U.K.) 19 & 20 Vict., c. 97, s. 1.

[19] There was no similar protection after seizure of the goods. If the sheriff seized but left the goods in the custody of the debtor, who then sold

(continued...)

basic form of protection was preserved in section 4 of the *Seizures Act* until the recent amendments.

B. The PPSA Amendments

In 1988, the Alberta Legislature enacted the PPSA, which established a new integrated system for the creation, registration and enforcement of security interests in personal property. The act and the system it has established came into effect on October 1, 1990.

The PPSA amends section 4 of the *Seizures Act* quite dramatically.[20] The section as amended reads:

> (1) A writ of execution, from delivery of it for execution to a sheriff, binds the goods of the judgment debtor situated within the judicial district of that sheriff, but neither the binding effect of the writ nor seizure of the goods by a sheriff pursuant to the writ shall prejudice
>
> > (a) an interest in the goods acquired by any person in good faith for valuable consideration, unless that person had, at the time when he acquired his interest, notice that the writ had been delivered to the sheriff and remained in his hands unsatisfied, or unless the writ was registered before such interest was acquired;
> >
> > (b) subject to sections 20(1)(a) and 35(5) of the *Personal Property Security Act*, the interest of a secured party unless the writ is registered before such interest is perfected pursuant to the *Personal Property Security Act*;
> >
> > (c) subject to sections 20(1)(a) and 35(5) of the *Personal Property Security Act*, the interest of a secured party who has taken a purchase-money security interest in the goods that is perfected after registration of the writ but not later than 15 days after

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[19](...continued)
them to an innocent purchaser, the purchaser's title was subject to the seizure: *Jacobson* v. *Feschuk* (1953) 10 W.W.R. (N.S.) 439 (Alta. D.C.). For a contrary view, see W.A. McGillvray, "A Problem Arising Out of Section 4 of the Seizures Act" (1940-42) 4 Alberta Law Quarterly 77.

[20] PPSA, s. 97.

> > (i) the debtor obtains possession of the goods, or
> >
> > (ii) a third party, at the request of the debtor, obtains possession of the goods
>
> whichever is earlier.
>
> (2) Nothing in subsection (1)(a) affects an interest in goods acquired in good faith and for valuable consideration by any person under a transaction which was in the ordinary course of business of the execution debtor, whether or not the writ of execution was registered.

The amendments contemplate the registration of the writ of execution in the Personal Property Registry ("PPR") established by the act. Registration will not alter the nature of the binding effect of the writ. It will still commence with the delivery of the writ to the sheriff; however, the protection of innocent purchasers from the binding effect now provided by the proviso in section 4 will end with the registration of the writ in the PPR. After registration of the writ, purchasers from the debtor will take the goods subject to the writ, even if they are *bona fide*, have given a valuable consideration, and had no actual knowledge of the writ, just as any purchaser of personal property will take title subject to any security interest registered in the PPR.

The amendments also create an extremely significant exception to the effect of registration of the writ. Where the purchaser acquires bound goods in good faith and for valuable consideration from the debtor in the ordinary course of the debtor's business, the purchaser's title is not affected by the writ, even though the writ was registered in the PPR. Further, the ordinary course purchaser is not affected by the writ, even if he or she has actual knowledge of it.

C. Proposed System - A General Description

We have considered carefully the role of the writ of execution in the existing enforcement system and the alterations effected by the PPSA amendments discussed above. We have concluded that, even with the PPSA alterations, of which we generally approve, much more extensive renovations need to be carried out. It will be convenient to describe generally the system that we propose and then to set out the reasoning behind our proposal and some further details of the proposed system.

In the regime that we propose, the name of the writ of execution would be changed to "the writ of enforcement". A judgment creditor would be required to have the clerk issue a writ of enforcement and to deliver it to the sheriff before any enforcement process whatsoever could be undertaken. The writ of enforcement would serve to communicate to the sheriff the particulars of the judgment and to authorize the sheriff to accept lawful enforcement instructions from the creditor. Upon receipt of the writ, the sheriff would enter the writ into the "Enforcement Registry", a province-wide computer registry of all enforcement activity.

Delivery of the writ to the sheriff would not have any effect on the debtor's title, however, or on the title of any purchaser from the debtor, whether they knew of the writ or not. The writ would not bind the debtor's property until it was registered in the PPR. Ideally, and if technically possible, the writ would be registered in the PPR simultaneously and automatically when the sheriff entered it in the Enforcement Registry, but our proposed system does not depend on this being possible.

In effect, our proposal is that the two aspects of the present binding effect, the rendering of property liable to enforcement and the creation of a cloud on the debtor's title, be separated. The first would continue to occur on delivery of the writ to the sheriff; however, the second would occur upon registration of the writ in the PPR.

Upon registration in the PPR, the writ would bind all the personal property of the debtor, including choses in action, corporate shares and debts owed to the debtor. The binding effect would not be confined to the debtor's goods. The debtor's interests in land would continue to be bound only upon registration of the writ pursuant to the provisions of the *Land Titles Act*.

There would be no restriction of the effect of the writ to the judicial district of the sheriff to whom it was delivered. Upon delivery to the sheriff, enforcement processes anywhere in the province would be authorized. Upon registration of the writ in the PPR, all the debtor's personal property in Alberta would be bound, regardless of where it was located.

The "course of business exception" to the effect of registration of the writ on third-party purchasers, established by the PPSA amendments, would be continued. In addition, there would be a similar exception for purchasers of consumer goods of modest value, even though the sale was not in the ordinary course of the debtor's business. Further exceptions would be required for the purchasers of negotiable instruments, people receiving cash from the debtor, and purchasers of serial-numbered property where the writ was not registered against the property by its serial number. The need for these exceptions is discussed below.

D. Rationale and Details of the Proposed System

(1) Commencement Document Required for All Enforcement Processes

We noted in the discussion above that at present the creditor can undertake several enforcement processes without having delivered a writ of execution to the sheriff. We propose that to have access to any enforcement process a creditor be required to file a document with the sheriff.

Our recommendations for the reform of the specific enforcement processes involve the sheriff in some processes in which he has little or no role at present. For example, in the case of garnishment, we recommend below that the sheriff be assigned the tasks undertaken currently by the clerk's office. To fulfil this new role, the sheriff will require certification that a judgment has been granted in a much wider context than he requires it at present. A common commencement document will also be essential for the maintenance of a complete record of all enforcement activity in the Enforcement Register described below.

This proposal will not alter present practice significantly. The existing system of distribution of enforcement proceeds requires each creditor to file a writ of execution with the sheriff, and creditors typically file the writ immediately upon obtaining judgment. Our proposal is simply that this typical practice be made mandatory.

The commencing document can be simple. It need only include the clerk's certification that a judgment has been entered against the debtor and such particulars of that judgment as are required for enforcement, such as the names of the creditor and the debtor, the total amount of the judgment debt (including costs), and the date it was entered. If the creditor claims to be entitled to a priority in the distribution of enforcement proceeds, the writ should note that claim and the reason for it. Those parts of the present writ of execution that set out what the sheriff is to do having received the writ are superfluous and should not appear in the reformed document. The sheriff's duties upon receipt of the writ are established by law. Also, the many archaic features of the wording of the present writ of execution should be abandoned.

We have considered whether the writ should also set out the interest rate applicable to the judgment debt. At present, the interest payable on a judgment debt in Alberta is established by the federal *Interest Act* as 5%.[21] It has been held that this statutory interest rate applies even if the parties agree that a different interest rate would apply after judgment in the contract that gives rise to the debt upon which the judgment is granted.[22] Alberta legislation provides that the interest at the pre-judgment rate established by regulation is to apply after judgment, but the legislation has not been proclaimed.[23] When that provision

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[21] *Interest Act*, R.S.C. 1985, c. I-15, s. 13.

[22] *Canada Permanent Trust Company* v. *King Art Developments Ltd.* [1984] 4 W.W.R. 587, at 653-57 (Alta. C.A.) [hereinafter *King Art*].

[23] *Judgment Interest Act*, s. 6. The provision has not been proclaimed because it is in conflict with the paramount federal *Interest Act* provision. The federal provision applies only in British Columbia, Manitoba, Saskatchewan, Alberta and the Territories. In *King Art, ibid.* Moir J.A. noted that special provisions in the *Interest Act* relating to each of the provinces east of Manitoba were removed as those provinces adopted their own legislation. He noted that "unrealistic as is that rate

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comes into force, the interest rate payable on a judgment could change each year. Accordingly, we do not think it would be appropriate to include the interest rate in the particulars set out in the writ itself.

RECOMMENDATION 7:

ONE COMMENCEMENT DOCUMENT

A creditor who wishes to undertake any enforcement process should be required first to deliver to the sheriff a document issued by the clerk of the court certifying that a judgment has been entered against the judgment debtor and setting out such particulars of that judgment as are required for the conduct of enforcement procedures.

(2) The "Writ of Enforcement"

We think that the term "writ of execution" must be replaced, because the term "execution" traditionally refers to the seizure process. As the new commencing document will be required before any enforcement process can be undertaken, a new term is required.

In the tentative proposals of our Report for Discussion, we suggested that the document by which the enforcement process be commenced be called the "enforcement order"; however, that term suggests a document issued by the court after a judicial determination. The issuing of the enforcement commencement document would be an administrative act by the clerk of the court, not a judicial act by the court itself.

We are now of the view that the term "writ of enforcement" would be more technically accurate and more easily accepted by those working within the system. The term "writ of execution" is universally shortened to "writ" in practice. We think that it is desirable to alter the deeply engrained vocabulary of practice as little as possible.

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[23] (...continued)
of interest [the federal rate] in modern times, the remedy is for the Parliament of Canada." It has now been six years since Alberta adopted its own legislation, but the federal government has not yet moved to remove the *Interest Act* provision from application in Alberta.

RECOMMENDATION 8:

THE WRIT OF ENFORCEMENT

The enforcement commencement document should be called the "writ of enforcement".

(3) The Enforcement Register

In the Report for Discussion, we tentatively recommended that the Department of the Attorney General should establish a computerized register of enforcement activity. This suggestion received general approval from those who responded to the report.

As we envision it, there would be a centrally maintained single register for the entire province. Access to the register, for the purpose of making entries in it, would be possible from the office of each sheriff. Access for the purpose of making searches could perhaps be wider.[24] Each significant step in every enforcement process undertaken against each enforcement debtor would result in some entry being made in the register. Obviously, the first entry would record that the sheriff had received a writ of enforcement against a debtor and the particulars thereof. Whenever any subsequent step occurred, such as the instruction of seizure, the receipt of a notice of objection to seizure, or the issuing of a garnishee summons, the particulars would be registered in the Enforcement Register. Throughout this report, we refer to other occasions when an entry in the Enforcement Register would be made.

We think that the register would be extremely useful for purposes far beyond the important purpose of keeping track of the enforcement activity undertaken against each debtor. It would be valuable to creditors in determining easily the credit worthiness of those to whom they are thinking of extending credit and in avoiding wasteful repetition of unsuccessful enforcement efforts. It would facilitate co-operation among enforcement creditors and the undertaking of further enforcement procedures by other creditors. Given the proposed province-wide effect of the writ of enforcement, it would facilitate the co-ordination of the activity of the various sheriffs in respect of the same debtor. Its existence is also essential to several of the other reforms that we propose.

It may be noted that the establishment of such a computer register is far from a revolutionary suggestion. Both the clerk's office and the sheriff's office, at least in Edmonton and Calgary, already rely on sophisticated computer systems. Our proposals would, we expect, require amendment of the software programs currently in use and the extension of the system province wide. While the costs of such changes would not be insignificant, we expect that they will bear no comparison to the expenditure that would be involved if the present computer facilities did not exist, or if they were not as sophisticated as they are. Furthermore, we are of the view that it would be appropriate for the government to recover a significant portion of the cost of establishing the computer register by charging the users and beneficiaries of the system—the enforcement creditors—appropriate fees for its use.

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[24] It is conceivable that access could be obtained at each judicial centre or, for searching purposes, from private computer terminals. We have not considered whether such access would raise confidentiality or privacy issues.

RECOMMENDATION 9:

THE ENFORCEMENT REGISTER

There should be a computer register of all enforcement activity undertaken against each enforcement debtor. The register should be maintained centrally and should be accessible province wide from the offices of all sheriffs. The register should be available for public searches. It should be called the Enforcement Register.

Upon receipt of a writ of enforcement, the sheriff should enter the particulars in the Enforcement Register.

(4) Splitting of the Binding Effect

As we mentioned above, under the present system, the delivery of the writ to the sheriff both renders the debtor's property liable to enforcement processes and creates a cloud on the debtor's title that follows the goods if they are passed to third parties, subject to the exception for innocent purchasers. Our proposal is that these two aspects of the binding effect be separated.

The delivery of the writ to the sheriff in the reformed system would have only the first effect. Having received a writ of enforcement, the sheriff would be authorized to receive instructions from the creditor and to carry out those instructions. The debtor's property would be liable to the specific enforcement processes. If, for example, after delivering the writ to the sheriff, the creditor delivered legally complete instructions to seize goods, the sheriff would carry out those instructions, even though the writ had not yet been registered in the PPR.

The debtor's property, however, would not be "bound" in the sense that the title of third parties purchasing from the debtor would be subject to the writ, until the writ had been registered in the PPR. Accordingly, there would be no further need for the present "proviso" protection of third parties, which significantly complicates the section in its present form.

In essence, we are proposing that the time when third parties are affected be delayed. The PPSA will establish a province-wide, comprehensive and easily accessible personal property security registry. We think that the establishment of one universal system for the recording and "perfecting" of encumbrances on the title to personal property is extremely desirable. The consistency achieved by integrating the cloud aspect of the binding effect into that universal system far outweighs the loss of the cloud aspect between the time of delivery of the writ to the sheriff and the registration of the writ in the PPR.

Indeed, the loss of the cloud effect for that short time would be of little consequence. The practical effect of the present protection for *bona fide* purchasers from the debtor so weakens the cloud aspect of the binding effect of the writ that little would be given up during the delay that we propose. Moreover, the delay between delivery of the writ to the sheriff and registration of the writ in the PPR would be short if the creditor was even moderately efficient. In fact, as we suggest above, it might even be possible that computer technology would permit the registration of the writ in the Enforcement Register by the sheriff to effect an automatic registration of the writ in the PPR. Then our recommendation would involve no delay at all.

Under the arrangement that we propose, if the debtor sells property seized under a writ that has not been registered in the PPR, the creditor will have no remedy against the third-party purchaser. This is exactly the present state of the law, where the third party buys in good faith without knowledge of the writ. The only change under our proposal would be that the creditor would also have no remedy where the third party knew of the writ. We do not consider this a significant change, because the creditor could easily prevent this outcome by registering the writ in the PPR without delay.

RECOMMENDATION 10:

EFFECT OF DELIVERY OF THE WRIT TO THE SHERIFF

When the writ of enforcement has been delivered to the sheriff, the creditor should be able to undertake or instruct any enforcement process. The delivery of the writ of enforcement to the sheriff should authorize the sheriff to accept and carry out the lawful enforcement instructions of the creditor; however, that the writ has been delivered to the sheriff should have no effect on a third party who might deal with the debtor, even where the third party has knowledge of the writ.

(5) All Personal Property Bound

At present, the binding effect of the writ is confined to "goods"—tangible personal property, property exigible at common law. Other forms of personal property have been made exigible by statute. It has long been recognized that the fact that such property is not "tangible" does not prevent it being made the subject of a specific enforcement process such as seizure.[25] We can see no reason, therefore, why the distinction between tangible and intangible property should be maintained in the context of the binding effect of the writ.

We think that the establishment of the PPR facilitates the abandonment of this distinction. The PPSA contemplates the registration of encumbrances on all forms of personal property. The term "security interest" is defined as "an interest in goods, chattel paper, a security, a document of title, an instrument, money or an intangible . . .". Once registered in accordance with the provisions of the act, security interests encumber the title to the property in which the interest is held.

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[25] It appears that the existing Alberta legislation intends to render all personal property exigible. Section 5 of the *Seizures Act* provides:

> 5. (1) By virtue of a writ of execution the sheriff charged with the execution thereof may seize and sell any equitable or other right, property, estate or interest of the debtor in or in respect of any goods or other personal property and any equity of redemption of the debtor therein, and also any leasehold interests in land and any other chattels real that are the property of the debtor.

This provision was adapted from a similar provision in the Ontario legislation. The Ontario provision referred to the exigibility of equitable and other interests in "goods and chattels". This was changed in the Alberta provision to "goods and other personal property". The use of this broader term and the inclusive language of the section in general suggest that no exceptions were intended. It is difficult to conceive of any valuable assets other than interests in land that the sheriff would not have authority to seize under this section.

The section was considered in *Capital City Savings & Credit Union, Limited v. 299474 Alberta Ltd. et al.* (1989) 70 Alta. L.R. (2d) 215. Funduk, M.C. says (at 218):

> I also agree with the analysis of Dunlop, Creditor-Debtor Law in Canada, that section 5(1) is a "catch-all provision" which overcomes the common law limitations in a writ of *fi. fa*: pp. 149-61.

The PPSA contemplates the registration of a security interest in all of a person's personal property generally—without specific identification of individual items.[26]

We think that the binding effect of a registered writ of enforcement should extend to all the property of the debtor against which a registered consensual general charge would be effective. Anyone dealing with the debtor after a writ has been registered should be affected by the writ regardless of the nature of the property involved, but subject to various exceptions described below. The effect of the writ on third parties should not depend on the nature of the property any more than the effect of other encumbrances on third parties depends on the nature of the property.

We do not suggest that there should be no distinction between the interest of the creditor by virtue of the binding effect of the writ and the interest of the holder of a contractual security interest or a charge. The interest of a creditor under a writ of enforcement is not a proprietary interest in the sense that it would survive bankruptcy. We think it is necessary to continue with the present terminology. The writ of enforcement should continue to be said to "bind". It should not be said to "charge".

RECOMMENDATION 11:

ALL PERSONAL PROPERTY BOUND

Upon registration of the writ of enforcement in the PPR, all the personal property of the debtor should be bound. The binding effect should not be confined to the property exigible at common law.

(6) Binding Effect — Interests in Land

Obviously, registration of the writ of enforcement in the PPR can have no effect on the debtor's interests in land. At present, a writ binds a debtor's interest in land when the writ is registered in the General Register in the Land Titles Office. As a result of the *Land Titles Amendment Act, 1988*, the General Register will gradually diminish in importance, and eventually disappear. At the time of writing, however, it is not clear when this will happen.

Among other changes, the *Land Titles Amendment Act, 1988* added sections 17.1, 17.2 and 17.3 to the *Land Titles Act*. Sections 17.1 and 17.2 are in force, but 17.3 has not yet been proclaimed. Section 17.1(2) provides that after section 17.3

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[26] Except that registration is not effective in respect of some serial-numbered goods unless the serial number is included in the registration (s. 43(7)).

comes into force, no writs may be registered in the General Register: they will have to be registered on the certificate title of a debtor's land in order to bind that land. Section 17.1(12) says that the General Register ceases to exist three years after section 17.3 is proclaimed. Section 17.3 will require the Registrar to "maintain a record that will enable him to provide a list of land owned by persons who have the same name as a person specified in a request made to the Registrar for a search . . . ." We understand that proclamation of 17.3 awaits the development of the computer facilities that will permit the search-by-name process that is essential to the abandonment of the General Register.

In the system that we propose, the binding effect in respect of interests in land would continue to commence with registration at the Land Titles Office. Our proposals would be consistent with either the "register by name" or "register on title" approach, although we assume that there will be no General Register.

RECOMMENDATION 12:

BINDING EFFECT — INTERESTS IN LAND

The debtor's interests in land should be bound only upon registration of the writ in accordance with the provisions of the *Land Titles Act*.

(7) Binding Effect — Garnishable Debts

How will our recommendation on the binding effect of the writ of enforcement operate in the context of garnishment? We think it will introduce an element of consistency that is lacking in the present system.

Assets currently susceptible to garnishment, debts due and accruing due, are not bound by the writ of execution. By Rule 471, the debt is "bound" by the garnishee summons when it is served on the garnishee. Practically, this has the same effect on debts as delivery of the writ of execution to the sheriff has on goods. Thereafter, any transfer of the debt by the debtor to a third party will be subject to the garnishment, just as any transfer of the debtor's goods would be subject to the binding effect of a writ of execution. In addition to its effect on the debtor, the binding effect of the garnishee summons also prohibits the garnishee from paying the debt to the debtor or anyone else other than the clerk of the court.

Our recommendation is that, from the time of its registration in the PPR, the writ of enforcement should bind all the debtor's assets, including those reachable by garnishment. Garnishable debts would be bound at the same time as all other personal property of the debtor.

Registration of the writ of enforcement will not, however, bind the garnishee as the garnishee summons does at present. The garnishee will continue to be at liberty to pay the debt to the debtor notwithstanding the registration of the writ of enforcement. Payment of the debt by the future garnishee to the debtor is not a transfer of title to the debt. There is no third party to be affected by the binding effect.

Similarly, the garnishee should not be at any risk if he or she honours an assignment of the debt made or served after registration of the writ of enforcement in the PPR but prior to the service of a garnishee summons. The assignee would receive the payment subject to the creditor's interest, but the garnishee would not be affected.

In short, the garnishee's conduct will not be affected until the garnishee summons is served. To avoid confusion it would be advisable to use a different word than "bind" to describe the effect of the service of the garnishee summons on the debt and the garnishee. In the draft legislation that accompanies this report, we have used the word "attach".

RECOMMENDATION 13:

BINDING EFFECT — GARNISHABLE DEBTS

Garnishable debts owed to the debtor should be bound from the time of registration of the writ in the PPR.

The binding effect of the writ in this context should be distinguished from the "binding effect" of service of the garnishee summons. The binding effect of the writ will not affect the conduct of the potential garnishee, who should be able to pay the debt to the debtor notwithstanding the writ. Only the debtor and transferees of the debt from the debtor will be affected.

The word "attach" should be used to describe the effect of serving the garnishee summons on the garnishee.

(8) Province-wide Effect

As suggested above, the Enforcement Register that we propose would be centrally located, with computer access available to all sheriffs. The registration of a writ of enforcement in the Enforcement Register could be deemed sufficient authority to all sheriffs to receive the lawful enforcement instructions of the creditor.

Furthermore, given that the PPR will have province-wide effect, it follows that the cloud aspect of the binding effect of the writ should also be province wide. The present limitation to the two aspects of the binding effect to goods "within the judicial district of the sheriff" is no longer necessary. Creditors will no longer need to deliver "alias" writs to sheriffs of other judicial districts where the debtor might have exigible property.

Unfortunately, as far as interests in land are concerned, it appears that it will not be possible to deal with just one of the two land titles offices if the debtor owns property in the jurisdictions of both. Since registration against specific land titles will be required, we cannot recommend that a registration in one land titles office should automatically effect registration in the other. We expect, however, that computer technology will advance quickly to where searches of the records of both offices from either, and the registration of encumbrances in one office from the other, will be possible. When this occurs, creditors will easily be able to achieve province-wide effect for their writs in respect of interests in land.

RECOMMENDATION 14:

PROVINCE-WIDE EFFECT

The binding effect of the writ in respect of personal property should be province wide. The present limitation of the effect to property within the judicial district of the sheriff to whom the writ is delivered should be abandoned.

(9) The Course of Business Exception

We noted above that a writ registered in the PPR does not affect a purchaser who takes from the debtor in the ordinary course of the debtor's business. For brevity, we shall refer to this as "the course of business exception". The reason for this exception is obvious. The consequences for ordinary commerce, if every transaction was liable to be upset by creditors who had registered writs against the vendor, would be unacceptable. No purchaser would be safe, unless he had searched the PPR to ensure that no writ was registered there. The course of business exception is essential to the acceptability of the changes that the PPSA amendments have effected. Accordingly, the exception must be included in the reformed legislation.

There is one detail of the course of business exception, however, that we wish to address. This detail is that the purchaser is protected even if he or she has actual knowledge of the writ. Like the course of business exception itself, this particular detail can be traced to section 30(2) of the PPSA, which protects buyers or lessees of goods that are subject to a security interest:

> A buyer or lessee of goods sold or leased in the ordinary course of business of the seller or lessor takes free of any perfected or unperfected security interest in the goods given by the seller or lessor ..., whether or not the buyer or lessee has knowledge of it, unless the buyer or lessee also has knowledge that the sale or lease constitutes a breach of the security agreement under which the security interest was created.

In the context of security interests, there is good reason for protecting buyers or lessees even if they know that the goods in question are subject to a security interest.

The purchaser of a car from a dealership, for example, will probably expect that the dealer's entire inventory is financed and that there is some security registered against the dealer by the financing institution. Obviously, the purchaser's title should not be affected by this knowledge. All interested parties—the vendor, the purchaser and the financier—probably intend that the purchaser should take title free of the financier's charge.

In the context of the registered writ, all interested parties—the vendor, the purchaser and the writ holder—will usually not have the same intent. The vendor and the purchaser will not intend that the transaction be affected by the writ; however, the writ holder will intend that the purchaser take subject to the writ.

Section 30(2) of the PPSA provides that where the terms of the security agreement do not permit the vendor to convey title free of the financier's interest, and the purchaser knows it, the purchaser will not be protected by the course of business exception.

We think a purchaser's actual knowledge of a registered writ is the equivalent of the purchaser's actual knowledge of a prohibition on conveyance in a registered security agreement. Under the present law, one who knows of the existence of an unsatisfied writ against his or her vendor is deemed to know that the writ binds the debtor's goods and that the title he or she purchases will be subject to the writ. We suggest that the course of business exception in the writ context would more closely parallel the course of business exception in the security interest context if it did not apply where there was actual knowledge of the writ.[27]

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[27] Furthermore, if the course of business exception in the writ context was limited to cases where the purchaser had no actual knowledge of the writ, it would parallel the "garage sale exception" (discussed below), which, as it now appears in the security interest context, is so limited. We can see no reason why these two exceptions should not be parallel.

We appreciate that it might be so difficult in many cases for the creditor to establish in practice that a purchaser from the debtor in the ordinary course had knowledge of the writ that the "no knowledge limitation" might rarely make any practical difference, at least after the third-party sale has occurred. But the original onus of establishing no notice would be on the purchaser. In any event, the limitation might serve to discourage dispositions to third-party purchasers who know of the writ and do not wish to risk having their title challenged.

Section 4(2) of the *Seizures Act* makes it fairly clear that the course of business exception applies after seizure if the goods have been left with the debtor on a bailee's undertaking. We agree that this should be the case. Seizure without removal does not alter the circumstances in any way—the debtor is apparently just as able to convey good title as he was before the seizure.

We acknowledge that the course of business exception might have the effect of encouraging the creditor to remove the seized property from the debtor's possession quickly to prevent the debtor from disposing of it in the ordinary course. We are not concerned, however, that the exception will encourage precipitous removals generally—it only applies where the seized property is something that the debtor ordinarily sells in his or her business. Furthermore, we expect that creditors will recognize that such removal might be undesirable since sale of the goods in the ordinary course is likely to yield a greater return than sale by any other means. Prudent creditors will refrain from precipitous removal, and instead have a receiver appointed so that there can be a "controlled" sale of the goods in the ordinary course.

RECOMMENDATION 15:

ORDINARY COURSE OF BUSINESS EXCEPTION

A writ registered in the PPR should not affect the interest of a third party in goods acquired from the debtor in good faith, for valuable consideration, without actual knowledge of the writ, and in the ordinary course of the debtor's business.

The course of business exception should also apply to sales by the debtor of seized goods that have been left with the debtor on a bailee's undertaking.

(10) The "Garage Sale" Exception

There is another type of transaction, other than the course of business transaction, where the registered writ should not affect the purchaser. As the PPSA amendments to the *Seizures Act* are structured at present, anyone who buys any goods from someone whose ordinary business is not to sell such items will either have to search the PPR or accept the risk that a writ might be registered there. This would be the case in even the most innocent and casual private transactions, such as the sale of a bicycle between two neighbours, or the sale of used household goods in a garage sale.

The drafters of the PPSA recognized that such private casual transactions should not be prejudiced by registered security interests. Section 30(3) and (4) of the PPSA provide that a buyer of consumer goods[28] who has no actual knowledge of a security interest in the goods takes free from the interest, even though it is registered in the PPR, if the purchase price is less than $1000. This exception (which has acquired label, "the garage sale exception" label) was not included in the PPSA amendments to the *Seizures Act*, however, and therefore does not apply where there is a writ registered against the vendor.

We think that the exception should apply in the writ of enforcement context as well. People who buy inexpensive items from vendors who do not ordinarily engage in the business of selling such items should not be expected to search for writs any more than they are expected to search for contractually created encumbrances. An obligation to search in such circumstances would deter casual private sales transactions without significant benefit to anyone.

This exception should also apply where the seized consumer goods have been left with the debtor on a bailee's undertaking.

RECOMMENDATION 16:

"GARAGE SALE" EXCEPTION

A writ registered in the PPR should not affect the interest of a third party in consumer goods acquired from the debtor in good faith, for valuable consideration, and without actual knowledge of the writ where the consideration paid or the value of the goods does not exceed $1000.

This "garage sale" exception should also apply to sales by the debtor of seized consumer goods that have been left with the debtor on a bailee's undertaking.

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[28] Defined by s. 1(h) as "goods that are used or acquired for use primarily for personal, family or household purposes."

(11) Negotiable Instruments Exception

Negotiable instruments provide an effective means of transferring credit, because the transferee for value need not be concerned about any defect in the transferor's title if the instrument appears regular on its face and has been duly endorsed.

Because negotiable instruments were made exigible by statute[29] and not by the common law, they are not bound, under the existing law, by delivery of the writ of execution to the sheriff. They are unaffected by enforcement proceedings until seized. The recommendations described above would alter this law. Negotiable instruments would be bound by the writ of enforcement from the time of its registration in the PPR.

If registration of the writ was allowed to have the same effect in the context of negotiable instruments as it has in other contexts, ie, the cloud effect, then a person to whom a negotiable instrument was negotiated would take subject to any writ of enforcement registered against the transferor. This would be so even though the transferee satisfied all the conditions that, under the law of negotiable instruments, he or she must satisfy to take the instrument free of any defect in his or her transferor's title. As they stand, our recommendations would put enforcement law in conflict with the law governing negotiable instruments.

Quite apart from any constitutional issues that such a conflict might raise,[30] the restriction on negotiability would be unacceptable on both practical

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[29] *Judgments Act, 1838*, (U.K.) 1 & 2 Vict., c. 110, s. 12.

[30] If the provincial legislation impaired the quality of negotiability, it would probably be *ultra vires*. Section 91(18) of the *Constitution Act, 1867*, assigns the subject "bills of exchange and promissory notes" to the federal government.

In *A.G. Alberta and Winstanley v. Atlas Lumber Co. Ltd.* [1941] S.C.R. 87, it was held that provincial legislation removing the right of a promissory note holder to recover judgment upon the note against the maker was *ultra vires* since that right had been given by the federal *Bills of Exchange Act*.

In *Duplain v. Cameron* [1961] S.C.R. 693, provincial legislation prohibiting persons not registered under securities legislation from trading in promissory notes not maturing more than a year from date of issue was upheld as being in pith and substance legislation in relation to securities—a matter of property and civil rights. Cartwright J. observed (at 709-10) that:

(continued...)

and commercial grounds. Improvement of the money judgment enforcement system at the price of damage to the concept of negotiability would be too costly.

We think that another exception to the effect of registration of the writ in the PPR is necessary. The PPSA provides such an exception in the context of registered security interests in section 31(3):

> A purchaser of an instrument or a security has priority over a security interest in the instrument or security perfected [under this Act] if the purchaser
>
> (a) gave value for the instrument or security, and
>
> (b) acquired the instrument without knowledge that it was subject to a security interest, and
>
> (c) took possession of the instrument or security.

Given our recommendation that the binding effect of the writ registered in the PPR should extend to all personal property of the debtor, this negotiable instruments exception should apply in the writ context as well.

This exception should also apply where the instrument has been seized but left with the debtor on a bailee's undertaking.

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[30] (...continued)

> The rights of the holder of such a note are not impaired; he is free to enforce payment of the note, to negotiate it or to deal with it in any manner in accordance with the law of bills and notes. . . .
>
> If, contrary to the view that I have expressed, the statute had the effect of altering the character of promissory notes issued in contravention of its provisions, and particularly if it destroyed their negotiability, I would share the view of my brother Locke that is provisions are *pro tanto* invalid. I am in complete agreement with his statement that a provincial legislature may not extend its own jurisdiction, so as to trench upon the exclusive jurisdiction vested in Parliament by one of the heads of s. 91, by annexing to legislation within its power provisions which trespass upon such a field.

See also *Traders Finance Corp. v. Casselman* (1958) 25 W.W.R. 289 (Man. C.A.), affirmed [1960] S.C.R. 242 and *Canadian Imperial Bank of Commerce v. Materi and Materi* [1975] 2 W.W.R. 299 (B.C.S.C.).

RECOMMENDATION 17:

NEGOTIABLE INSTRUMENTS EXCEPTION

A writ registered in the PPR should not affect the interest of a holder of a negotiable instrument acquired from the debtor in good faith, for valuable consideration, and without actual knowledge of the writ.

This exception should also apply to transfers by the debtor of seized negotiable instruments that have been left with the debtor on a bailee's undertaking.

(12) Money Exception

There is one kind of negotiable instrument that we think a third party should be able to acquire, for value, from an enforcement debtor whether or not the third party knows of the writ: money.[31]

We think that a person who sells something to the debtor and receives payment in cash should not be affected by the registered writ of enforcement even if he or she knows about it. No one should be at risk when accepting cash for value. In this respect, we would parallel section 31(1) of the PPSA, which provides that a holder of money has priority over a perfected security interest if he or she is a holder for value, whether or not he or she acquired the money without the knowledge that it was subject to a security interest.

RECOMMENDATION 18:

MONEY EXCEPTION

A writ registered in the PPR should not affect a person who acquires money from the debtor in good faith or for valuable consideration, whether or not the person had actual knowledge of the writ.

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[31] Section 1(1)(bb) of the PPSA defines "money" as "a medium of exchange authorized by the Parliament of Canada or authorized or adopted by a foreign government as part of its currency."

(13) Serial-numbered Goods Exception

The PPSA provides that the registration of encumbrances against some types of property will require that the property be described by serial number.[32] It will be possible to search for encumbrances by searching the serial number of the property in question.[33] A purchaser looking for encumbrances will probably search only by serial number. A search by serial number will not reveal, however, that the debtor's property is bound by a writ unless the writ has been registered against the appropriate serial number.

We think that such a purchaser should not be affected by the writ. Security interests in serial-numbered property are ineffective if they are not registered against the serial number. We think that the situation with writs of enforcement should be parallel. The purchaser, assuming that he or she has no actual knowledge of the writ, should be unaffected unless the writ is registered against the serial-numbered property specifically. The enforcement legislation should incorporate the PPSA's distinction between goods that may be and goods that must be registered by serial number. The serial number exception would apply only to goods that must be registered by serial number.

RECOMMENDATION 19:

SERIAL-NUMBERED GOODS EXCEPTION

A writ registered in the PPR should not affect the interest of a purchaser of "serial-numbered goods" acquired from the debtor in good faith, for valuable consideration, and without actual knowledge of the writ unless the writ is registered against the serial number specifically.

E. Priorities between Writs and Security Interests

The PPSA amendments to section 4 of the *Seizures Act* provide for determining the priority of registered writs and registered security interests in a variety of situations. The amendments provide a general rule and an exception:

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[32] PPSA, ss 43(7), 71(1)(e)(iv).

[33] PPSA, s. 48(1).

a. Rule: A security interest, whether perfected or not, that has attached to personal property before the property becomes bound by a writ has priority over the writ.[34]

b. Exception: Where there has been seizure under a writ the interest arising by reason of the seizure has priority over an unperfected security.[35]

We believe that the rule giving priority to an unperfected security interest over a subsequent writ is appropriate. The common law rule is that the writ does not bind any greater interest than the debtor has. The adoption of a system by which the writ is registered should not alter this.[36] The writ should continue to

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[34] *Seizures Act*, s. 4(1)(b). This provision could be read as having exactly the opposite effect: that a subsequent writ has priority over an earlier security interest if the writ is registered in the PPR before the security interest is perfected. The relevant part of subsection (1) reads:

> (1)... but neither the binding effect of the writ nor seizure of the goods by a sheriff pursuant to the writ shall prejudice
>
>> (b)... the interest of a secured party **unless** the writ is registered before such interest is perfected.... [*emphasis added*]

One might take from this that a writ that is registered in the PPR before a security interest is perfected does "prejudice" the secured party, **whether or not** the writ has bound the goods before the security interest attaches. It must be kept in mind, however, that the common law rule is that writs bind only the debtor's interest in property. At common law, a writ would not affect the interest of someone who already had a security interest in the debtor's goods when they became bound by a writ. The whole purpose of the quoted part of clause (b) is to limit the common law effect of the writ, not to enlarge it.

[35] PPSA, s. 20(1)(a).

[36] Reasonable reformers and legislators may differ on this point. In Saskatchewan, s. 2.2 of the *Executions Act*, R.S.S. 1978, c. E-12, does give priority to a writ that is registered before an earlier security interest is perfected:

> Every writ of execution issued against goods on or after the coming into force of the *Personal Property Security Act*, binds, from the time of its delivery to the sheriff to be executed, all the goods of the

(continued...)

bind only the interest that the debtor held whether the extent of that interest is revealed by the register or not. It cannot be said that the creditor relies on the register in the same way as one who acquires a security interest does.

We note that the same general rule and exception apply in the land titles context. A writ registered on title does not have priority over a previously created but unregistered interest in land.[37]

We consider the exception to the general rule also to be appropriate. The PPSA provides that an unperfected security interest does not have priority over the interest of an execution creditor who has caused the property to be seized.[38] It might be suggested that seizure should not be the event that closes off the security interest holder's ability to perfect his or her security and to claim priority over the writ. Arguably, a security interest holder should be at liberty to perfect his or her security anytime up to the point of the sheriff's sale of the seized property, as long as the creditor who has effected seizure and instructed sale is reimbursed his or her thrown-away costs. We think, however, that such an arrangement would be overly solicitous for the secured creditor. We think that it is reasonable to permit the creditor to rely on the state of the register in determining whether or not to proceed with enforcement sale after seizure.

RECOMMENDATION 20:

PRIORITIES BETWEEN SECURITY INTERESTS AND REGISTERED WRITS

A security interest, whether perfected or not, that exists at the time the writ is issued should have priority over the writ, whether the writ is registered or not, except that where there has been seizure under a writ the interest arising by reason of the seizure should have priority over an unperfected security.

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[36](...continued)

> judgment debtor within the province, and, if it is registered, takes priority over a security interest which has not been registered or which is registered after the writ of execution is registered . . . .

[37] *Jellett* v. *Wilkie* (1896) 26 S.C.R. 282; *Price* v. *Materials Testing Laboratories* (1976) 5 W.W.R. 280 (Alta. S.C.T.D.).

[38] PPSA, s. 20(1)(a).

F. Time Considerations — Time of Issuing, Duration

Our proposals contemplate that the writ of enforcement could be issued anytime after entry of the formal judgment. We considered whether it should be possible to have the writ issued immediately upon pronouncement of the judgment and before formal entry of the judgment. Certainly, there will be occasions when the creditor fears that the debtor will take steps to frustrate enforcement proceedings and will be anxious therefore to have the writ issued as soon as possible. We have concluded, however, that certainty as to the terms of the judgment is more important than allaying the creditor's fears in such a case. Although it might require considerable effort, the creditor who has such fears will simply have to ensure that the judgment roll is formalized without delay.

Under the present Rules 355 and 356, the writ of execution can be issued anytime within six years from the date of the judgment. After the six-year period has expired, the creditor must apply for leave to issue a writ.

We think that this six-year limitation serves no useful purpose and would discontinue it. The only situations where leave should be required to issue a writ of enforcement are those where the parties have changed and it is necessary to establish that the person desiring to issue the writ has the legal authority to do so. This situation is also covered by the present Rule 356.

As to the duration of the writ of enforcement, we consider that the present Rule 363 deals properly with this issue. It provides:

> Unless otherwise provided by any statute, and except for the purposes of that statute, every writ of execution remains in force so long as the judgment on which it is issued remains in force.

A provision to this effect should be included in the reformed statute. In our Report on Limitations,[39] we have recommended that a judgment should remain in force for 10 years.

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[39] Alberta Law Reform Institute, Report No. 55, *Limitations* (Edmonton: ALRI, 1989), at 42.

RECOMMENDATION 21:

TIME OF ISSUING WRIT AND DURATION OF WRIT

The judgment creditor should be allowed to issue a writ of enforcement anytime after entry of the formal judgment and during the time that the judgment is in force.

The existing rule, which says that after six years a writ can be issued only with leave, should be abandoned.

The writ of enforcement should continue in force for so long as the judgment on which it is issued remains in force and the debt remains unsatisfied.

CHAPTER 3
DISCOVERING DEBTORS' ASSETS

A. Extrajudicial Discovery

To undertake any specific enforcement procedure, the creditor must have some specific information regarding the debtor and his assets. Seizure, for example, is not likely to succeed unless the creditor provides the sheriff with information as to where the debtor resides or where his or her property can be found. Garnishment cannot be undertaken unless the creditor knows of a debt owed to the enforcement debtor.

The enforcement system itself gives the debtor little assistance in discovering the information that he or she requires. There is one procedure, examination in aid of execution, that the creditor can use for this purpose, but, as we suggest below, it is not an effective means of acquiring the necessary information, and we do not believe it can be reformed to improve its effectiveness significantly.

By far the most important sources of information are those that the creditor can tap without the assistance of the courts. These might include the information that the creditor acquired when credit was granted or through the course of dealing with the debtor, such as where the debtor banks and lives, or for whom the debtor works. The creditor might discover property that the debtor owns, or in which he or she has a substantial equity, by searching public registries, such as the motor vehicles registry, the chattel security registries that currently exist, and soon the Personal Property Registry. The land titles registry will soon be made accessible for this purpose when searches by the name of the landowner are possible.[40] Creditors might also have access to the records of credit reporting agencies.

The creditor can also search the sheriff's file for information as to enforcement activity that has been undertaken with respect to a particular debtor. The reformed enforcement system that we propose in this report contemplates improved access to information regarding past and progressing enforcement procedures against a debtor. Detailed records of such activity will be maintained in the "Enforcement Registry", in which anyone can search.[41]

The present task, however, is to consider how the more formal processes that the law provides for locating the debtor's assets can be improved.

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[40] *Land Titles Amendment Act* 1988, s. 9 (which enacts 17.3 of the *Land Titles Act*).

[41] For a description of the Enforcement Registry, see Chapter 2.

B. Debtor's Assets Questionnaire — Voluntary Financial Statement

Other law reform agencies have been of the view that the debtor should have a legal obligation to disclose his or her means and circumstances fully, and should therefore be required either to complete a questionnaire or to attend an examination by the enforcement officer.[42] The Ontario Law Reform Commission[43] recommended that the creditor be required to attempt to obtain a completed questionnaire before being allowed to examine in aid of execution. It was contemplated that a court officer would attend upon the debtor to have him complete the questionnaire form or that the form would be mailed to the debtor with the intent that it be completed and returned.

The procedure has been proposed for enforcement systems that are operated by an enforcement officer and are not reliant on creditor initiative; but we do not think that this distinction would, by itself, make the proposal inappropriate for the creditor-driven system.

The merits of the questionnaire idea are that it would eliminate the need for oral examination in most cases and that the required information would be obtained more quickly than by using oral examination. There would be a saving of time and expense for all concerned. Furthermore, the information obtained could be made available to other creditors much more easily than is possible at present with the oral examination for which a transcript is usually not obtained.

Weighing against the proposal is the likelihood that many debtors would ignore a mailed questionnaire or would not provide full and complete information. Designing a standard form that could cover all contingencies would be difficult. If such a form were designed, it might well be too complicated for many debtors to complete unassisted. The process of getting the debtor to complete the questionnaire could be as complicated and as frustrating as the present process of compelling him or her to attend an examination.

We asked for comment on the questionnaire idea in our Report for Discussion, and the response was almost universally negative. Respondents thought that the procedure would be impractical, unlikely to provide any real benefit, and would delay the process of examination in aid to the disadvantage of creditors. One respondent observed:

> The idea of sending a written questionnaire to the debtor for completion and return is commendable, but not practical. Debtors fail to show up on

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[42] *Report of the Committee on the Enforcement of Judgment Debts* (London: HMSO, 1969), Cmnd. 3909, at 82-3 [hereinafter Payne Committee]; Ontario Law Reform Commission, *The Enforcement of Judgment Debts and Related Matters*, Part I (Toronto: OLRC, 1981), at 155-56 [hereinafter OLRC Part 1].

[43] OLRC Part 1, *ibid.* at 158.

> examinations, let alone answer questions or complete undertakings. There is no reason to think that a debtor will complete a written questionnaire and return it promptly. Someone must administer it and . . . the best person is the judgment creditor.[64]

Another noted that:

> . . . in negotiating a settlement with the debtor, I am frequently called upon to request that the debtor complete a statutory declaration as to his present assets and liabilities. If the debtor retains a lawyer, these are usually completed in a satisfactory form, although even then the declarations are sometimes incomplete. If the debtor does not have a lawyer, invariably there is some deficiency or oversight, whether by design or inadvertence, as to the debtor's assets.[65]

We agree with our respondents and do not recommend the adoption of an assets questionnaire; however, we do think that a variation on the idea would serve a useful purpose.

The general difficulty that creditors encounter in determining what assets their debtors have can result in harsh consequences for some debtors. This is because the system does not permit a creditor to distinguish easily between a "can't pay" debtor and a "won't pay" debtor. Although enforcement processes are useful only against the latter, a creditor who lacks adequate information might incur significant costs and subject a debtor who has no exigible assets to considerable hardship and inconvenience before he or she discovers that the effort is in vain.

We think that there is a means by which a debtor can protect himself or herself from the hardship, inconvenience and waste that the system can produce in such circumstances. The debtor should be given the opportunity to file with the sheriff a sworn statement of his or her assets and liabilities, which can show the creditor whether enforcement processes are warranted. The statement should also disclose any dispositions of property that the debtor has made since the debt was incurred. A form for the statement should be readily available in the sheriff's office and other agencies so that debtors can easily complete it and have it filed. The form should be sufficiently simple that the ordinary debtor will not require the assistance of a lawyer to complete it. The debtor would be obliged to submit to cross-examination by the creditor on this statement if the creditor wanted it. Such examination would be in addition to examination in aid of execution if the creditor wished to avail himself or herself of both processes separately. It might be that few debtors will use this opportunity. Its availability, however, would allow the "can't pay" debtor a means of identifying himself or herself, and would give the creditor some justification for assuming, in the absence of the statement, that there is something to enforce the judgment against.

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[64] Letter from F. Bennett, Toronto, to the Institute (February 5, 1987).

[65] Letter from P. Vaartnou, Edmonton, to the Institute (November 20, 1986).

Obviously, the statement should be available for inspection by all enforcement creditors of the debtor.

RECOMMENDATION 22:

VOLUNTARY FINANCIAL STATEMENT

The enforcement debtor should be given the opportunity to file with the sheriff a sworn statement of his or her assets and liabilities and the dispositions of property he or she has made since the debt was incurred. A simple form, on which such a statement can be made, should be available to debtors from the sheriff. The debtor should be subject to cross-examination on the statement by the creditor. The statement should be available to all enforcement creditors of the debtor.

C. Examination in Aid of Execution

The Rules of Court provide a process that a creditor may use to discover information regarding a debtor's assets. The process is called "examination in aid of execution".[46]

A creditor wishing to use the process makes an appointment for the examination with either the public court reporters or a private court reporter and, at least 48 hours before the appointment, serves the debtor personally with a notice of the appointment.

If the debtor attends, he or she is examined under oath as to his or her assets at the time the debt was incurred, present assets and the particulars of any disposition of assets made since the debt was incurred. Unlike other jurisdictions,[47] where the examination is conducted by an official of the court, in Alberta, the examination is conducted by the creditor, or more usually, the creditor's lawyer. Usually, the court reporter presides at the examination—there is no other judicial officer present.[48] There is no requirement that a transcript be prepared, and we are told that, except where the amount of the judgment is large, it is rare for the creditor to order a transcript. There is no requirement that the transcript, if one is prepared, be filed with the sheriff.

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[46] Rules 372-380, 382.

[47] The British Columbia Rules of Court provide, for example, that the examiner shall be the court, a master, or a registrar designated as an examiner by the chief justice: Rule 42(31).

The Rules contemplate similar examinations of officers of debtor corporations,[49] employees or former employees of the debtor,[50] transferees from a debtor,[51] persons or corporations in possession of property of the judgment debtor,[52] or any party or person "where a difficulty arises in or about the execution or enforcement of a judgment".[53] In the latter four cases, a court order permitting the examination must be obtained first. Examinations of the debtor or of an officer of a corporate debtor can be undertaken without an order. Only one examination of the debtor may be conducted each year.[54]

Our study of a sample of sheriff's office files from 1980 and 1981 suggested that the process was not used extensively. Appointments for examination in aid of execution were issued in only 7.4% of the cases where a writ of execution had been issued. The files did not contain sufficient information for us to determine how many examinations were actually held. Some practitioners who commented on our study suggested in interpreting these figures that it should be kept in mind that the procedure is often not used because the amount of the debt is too small to justify its use. A better foundation for conclusions about the extent of use of the procedure would be provided if small judgments were eliminated from the sample being assessed.

Where the debtor fails to attend, the creditor may apply for an order that the debtor be held in civil contempt.[55] The practice is that on the first failure to attend the court will issue only an order that the debtor attend at a second appointment. The order and the second appointment must be personally served on the debtor. If the debtor fails to attend on the second occasion, the court may issue a contempt order.

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[48] Rule 728.

[49] Rule 373.

[50] Rules 372(3), 373(2).

[51] Rule 374.

[52] Rule 375.

[53] Rule 379.

[54] Rule 372(2).

[55] Rules 377, 378.

We are advised by the public court reporters in Edmonton that one reporter is assigned to attend "in aids" every afternoon except Monday. The public reporters currently book up to five examinations an afternoon, but it is unusual that all 20 appointments available in each week are booked. In Calgary, two reporters are available on Monday and Friday afternoons for four appointments each. The 16 weekly appointments are often all booked, but cancellations are routine. There are official court reporters in each of the other judicial districts in Alberta, and they are also available to conduct examinations in aid in their judicial districts. We were advised that there is no significant delay in obtaining an appointment for an examination from the public reporters. In addition, there are many private court-reporting services in both Calgary and Edmonton that conduct examinations in aid of execution. There would appear to be no deficiency in the capacity of the system to accommodate the current demand for examinations in aid. In fact, given the number of cancellations and "failures to attend", the existing capacity appears to be under used.

There does not seem to be a problem concerning the scope of examination, for the Rules of Court and the cases interpreting them permit the creditor a broad scope.[56]

We do not think that there is any need to alter the present restriction of one examination per creditor per year either. The Ontario Law Reform Commission recommended that the period be reduced to six months as part of a restructuring of the discovery procedure, which included the questionnaire idea that we have decided not to adopt.[57] Given that examination by another creditor is possible without order, and that a creditor can apply for an order permitting further examination before the expiration of a year, if there is good reason for having a further examination, we are of the view that the present restriction is appropriate as a check on the harassment of debtors.

Practitioners seem to have two basic complaints with respect to the examination in aid of execution procedure. First, the creditor rarely learns anything useful. One practitioner observed, without intended cynicism, that if the debtor shows up it is usually because he or she has no exigible assets.[58]

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[56] *Beau Monde Ladies' Tailoring Co. v. Barrett* (1925) 3 D.L.R. 957 (Ont. S.C.); *Killops v. Potter* (1915) 9 W.W.R. 181 (Alta. S.C.).

[57] Ontario Law Reform Commission, *The Enforcement of Judgment Debts and Related Matters*, Part II (Toronto: OLRC, 1981), at 161 [hereinafter OLRC Part 2]. The Ontario Commission contemplated that there would be only one examination or questionnaire during the six-month period for all creditors. Under our present system, each creditor is entitled to one examination per year.

[58] The court can be of considerable assistance to a creditor, however, where it is apparent that the debtor is being unco-operative and evasive in an examination in aid of execution. See *111246 Construction Ltd. v.*

(continued...)

Second, more often than not the debtor does not attend. The various reporters that we consulted estimated the "no-show" rate to be between 60 and 80%.[59]

We do not think that there is any reform that could remove the first complaint. We observed above that the examination in aid process is usually used only where the creditor has been unable to discover any or sufficient exigible assets using extrajudicial methods of inquiry. The examination process is usually tried only as a last resort, and like most last resorts it often fails to satisfy. This is not the fault of the procedure.

For many creditors, the usefulness of the examination in aid process has little to do with discovering the debtor's assets. Its main usefulness is as an inducement to the debtor to make some arrangement for payment of the judgment to avoid having to attend for examination. Students-at-law learn early in their careers never to agree to a postponement of an "in aid" except in return for payment or at least the debtor's consent to an order to attend a second appointment. If the debtor attends, even though the creditor might not learn anything of significance by the formal examination, the creditor's solicitor and the debtor have an opportunity to discuss the situation and perhaps come to some arrangement for satisfaction of the judgment. For the accomplishment of these purposes, the existing procedure is adequate.

As for the second complaint, the problem is with the cumbersome nature of the system by which attendance is enforced. One of the most significant practical problems arises out of the number of "personal services" that the procedure requires. The appointments and notices of motion for orders requiring attendance or citing the debtor in contempt must all be personally served. Service usually involves significant cost and frequently cannot be accomplished easily, especially when the debtor is unco-operative, which is often the case. In addition, attendance by the creditor's solicitor, for the examination appointments at which the debtor does not appear and at the court applications to secure orders requiring attendance, creates a significant cost for the creditor, not to mention the costs of the court reporters for attending an aborted examination. In most cases,

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[58](...continued)

Strathmore Investments Ltd. (1989) 66 Alta. L.R. (2d) 409, where Master Breitkreuz ordered that three of the defendant's employees appear for examination and that the defendant file an affidavit of documents on the disposition of assets from the date of the statement of claim. Costs on a solicitor-client basis were awarded to the creditor.

[59] In our empirical study, we found 13 cases where an application for an order was made upon the debtor's failure to attend the first appointment. An order requiring attendance was granted in 10 cases. The debtor still failed to attend in three of these cases—the files did not indicate if the debtor attended in the other seven. In one case, the debtor was committed for contempt.

the likelihood of recovering these costs is remote. These practical realities probably militate against the use of the procedure to a significant degree.

We do not think that there are any reforms that would improve significantly the existing procedure for compelling attendance. We agree that the repeated requirements for personal service and the series of appointments and applications that the present practice require make the procedure cumbersome and impractical in many cases, but each of these elements in the procedure is required and cannot reasonably be removed.[60]

(1) Information for the Assistance of Other Creditors

There is one minor reform that we would recommend, however. The Ontario Law Reform Commission recommended that a transcript be prepared of every examination in aid and that a copy of it be filed with the sheriff so that the information assembled by the examination process could be used by all creditors.[61]

The idea is attractive, but we do not think it would be practical in Alberta. The reporters that we consulted indicated that at present a transcript is ordered in less than 10% of the cases where an examination is conducted. Of course, this does not mean that no useful information was obtained in those cases where no transcript was ordered, though that might well be the case. It is at least equally as likely that the solicitor conducting the examination made a note of the information that would be useful in subsequent enforcement efforts and thus avoided the expense of a transcript.

To require that a transcript be prepared in every case would be to render the process considerably more expensive than it is at present and to discourage the use of the process. The requirement therefore might well not result in a net increase in the amount of information that is filed with the sheriff and to which other creditors can obtain access.

We do suggest, however, that where an examination has been conducted, the creditor should be obliged to inform the sheriff so that an entry to that effect can be made in the Enforcement Registry. Other enforcement creditors should have the right to order a transcript from the officer who conducted the examination if they wish.

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[60] We considered whether it would be acceptable to alter the service requirements to permit service by ordinary mail of the appointment, or at least of notices of motion for orders to attend or any order short of an order holding the debtor in contempt. We concluded that such a change would not improve the situation. It would be unlikely that the court would hold a debtor in contempt if the first document that it was certain that he or she had received was the notice of motion for the contempt application.

[61] OLRC Part 1, *supra*, note 42, at 163.

It was suggested to us that the creditor who conducts an examination in aid should have the right to keep the information developed confidential. We do not accept this suggestion. There should be no privilege attaching to the information that is obtained on an examination in aid. The Rules of Court contemplate the transcript of any examination being available to interested parties.[62] We maintain that all creditors with subsisting writs of enforcement are interested parties. The idea that the creditor who conducts an examination in aid could have some proprietary interest in the information obtained is completely inconsistent with the sharing principle that we consider to be fundamental to the existing and proposed enforcement system.

RECOMMENDATION 23:

INFORMATION FOR THE ASSISTANCE OF OTHER CREDITORS

There should be no requirement that a transcript of every examination in aid be prepared, but creditors should be obliged to inform the sheriff's office of examinations held so that this information can be entered in the Enforcement Registry. Other enforcement creditors may order a transcript from the officer who conducted the examination if they wish.

D. Third-party Information

We observed above that a judgment creditor can use the examination in aid of execution procedure to examine third parties who might have information about the debtor's assets. Employees and former employees, transferees from the debtor, and persons in possession of the debtor's property can all be examined with the permission of the court.[63] We would not propose any change to this arrangement, but we would add an alternative means of obtaining information from third parties. We think that it ought to be possible for the creditor to obtain a court order requiring a third party, who it is reasonable to expect would have information with respect to the debtor's assets, to provide that information to a creditor without a formal examination being conducted.

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[62] Rule 725. For consideration of the confidentiality of information developed on examination for discovery, see *Kyuquot Logging Ltd. v. British Columbia Forest Products Limited et al.* [1986] 5 W.W.R. 481 (B.C.C.A.).

[63] Rules 372, 374, 375.

The procedure that we envision would be similar to that employed by Revenue Canada under the authority of the federal *Income Tax Act*, which provides:

> 231.2(1) Notwithstanding any other provision of this Act, the Minister may, subject to subsection (2),[64] for any purpose related to the administration or enforcement of this Act, by notice served personally or by registered or certified mail, require that any person provide, within such reasonable time as is stipulated in the notice,
>
> (a) any information or additional information, including a return of income or a supplementary return; or
>
> (b) any document.

The difference between that procedure and the one that we propose is that no prior court approval is required under the *Income Tax Act* section, but we think that such an order should be required in the context that we are considering. We consider that this is necessary so that fishing expeditions that would greatly inconvenience third parties can be avoided. Moreover, in the procedure that we suggest, the third party should be paid a reasonable sum to compensate for inconvenience.

There is one particular context in which we think that this procedure would be useful and where we think that a court order should not be required. It is impossible, at present, to search by name of the debtor at the land titles office to determine if the debtor owns any land in Alberta; however, land ownership records that could be searched by name are maintained by the various municipalities. Some municipalities will permit access to this information; others will not.

We were advised by some municipalities that they have adopted a strict policy because of complaints that the information obtained from municipal tax rolls was being misused by some, particularly real estate agents. For example, City of Edmonton officials advised that they release only the information that they are obliged to release under the *Municipal Tax Act*.[65]

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[64] Subsection (2) is not relevant to our purposes.

[65] See ss 111, 112. The act requires municipalities to provide only information as to the tax status of land identified by legal description or municipal address.

The City of Edmonton has adopted a Freedom of Information Bylaw,[66] which expressly recognizes that "all municipal information should be made available to all persons requesting the same unless compelling reasons weigh against the release of certain information." Under the Bylaw, "information of a personal or private nature respecting an identifiable individual or corporation . . ." is exempt from release. We were advised by the director of tax collection for the City of Edmonton that her department has been instructed that information on land held by a named individual is exempt from release under the Bylaw.

The City's position is understandable. While enforcement creditors are legally entitled to know what assets an enforcement debtor owns, and should therefore have access to the information regardless of whatever personal or private character it may have, the City has no means of distinguishing between requests for information from enforcement creditors and other persons who have no legal entitlement to it. The City requires some means of knowing that the information is for enforcement purposes before it should be obliged to release it. We suggest that a certified copy of the writ of enforcement in favour of the party requesting the information would be sufficient.[67]

Of course, if a creditor wanted access to information in the hands of a municipality other than information as to land owned by the debtor as indicated by the municipal tax rolls, the general third-party information procedure would be applicable.

RECOMMENDATION 24:

THIRD-PARTY INFORMATION

Where a reasonable possibility that a third party has information regarding the debtor or his or her assets is established, and there is no reason why the third party should not be called upon to reveal the information to the creditor, the court should be able to order the third party to reveal the information to the creditor.

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[66] Bylaw 6865, adopted March 9, 1982

[67] When searches by name are possible at the Land Titles Office, this application of our proposed procedure will probably not be required; however, we are advised that it might be some time before this is possible.

A court order should not be required, however, to compel municipalities to release information as to whether or not an enforcement debtor is shown as the owner of land on municipal tax rolls. A municipality should be required to reveal this information to an enforcement creditor upon payment of a reasonable fee. The municipality might validly require production of a certified copy of the writ of enforcement to be satisfied that the creditor has a legitimate interest in obtaining the information.

CHAPTER 4
SEIZURE: THE GENERAL PROCESS

A. The Seizure Process

The usual method of enforcement against specific tangible chattels is seizure. It is a process by which the general "binding effect" of the writ of enforcement is transformed into a specific effect with respect to specifically identified assets of the debtor.[68]

The process of seizure begins when the creditor delivers written instructions to the sheriff to effect the seizure. Usually, the instructions suggest where the seizure should be carried out and what property should be seized. They also include such indemnity as the sheriff requires against liability for wrongful seizure. The sheriff assigns a bailiff to carry out the instructions.

In the typical case, the bailiff attends at the suggested premises, identifies the property to be seized, considers whether it is exempt from seizure, and, if it is not, serves the debtor or the person in whose custody the property is found with a "Notice of Seizure". Usually, the bailiff asks the debtor to complete a "Bailee's Undertaking", by which the debtor agrees to hold the seized property as bailee for the sheriff and to yield possession of it to the sheriff when requested to do so.

In addition, the bailiff gives the debtor a "Notice of Objection to Seizure" document and a stamped envelope addressed to the sheriff. The debtor can use these to initiate an objection to the seizure.

If no objection is initiated within a prescribed time, the creditor can instruct the sheriff to remove and sell the seized goods. If the debtor has filed an objection, the creditor must apply to the court for an order permitting the removal and sale of the seized goods. Upon this application, the court deals with the debtor's objection and, if it is without merit, orders the removal and sale of the seized property.

After the seized property is removed, it is usually sold at a sheriff's auction. The proceeds are then distributed according to the ECA.

This simple description of the seizure process might suggest that the process operates smoothly. In fact, even in the typical case, several of the steps described above produce considerable operational friction. Our approach will be to examine individual components of the seizure process in detail, to identify the friction-producing features, and to propose reforms to remove or reduce that friction.

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[68] Dunlop, *supra*, note 1, at 373 describes the purpose of the process of seizure as being:

> . . . to vest in the sheriff what has been described as a special property in the goods, so that an action for trespass or trover may be maintained against any person who takes them away.

B. The Sheriff's Role

(1) Exclusive Authority

The sheriff's authority to effect seizure is exclusive. The writ of execution, which is the basis of that authority, cannot be addressed to anyone other than the sheriff. The *Seizures Act* and ECA, which together contain the legislation governing seizures under writs of execution, do not contemplate anyone other than the sheriff or the sheriff's bailiffs carrying out this function.

At least one of the respondents to our Report for Discussion suggested that serious consideration should be given to using private bailiffs to carry out seizures. Our respondent said:

> We believe you should consider the question of private bailiffs. While the privatization of seizure process needs to be carefully circumscribed (and in that context particularly strict qualification requirements are needed for people who will act as bailiffs, perhaps even the standards of a trustee in bankruptcy), we feel that execution creditors' remedies would be greatly advanced by the addition of private bailiffs. At the same time realizations that occur through private bailiffs should have to go for distribution to the common government office, the Sheriff's office, to work with the sharing principle.[60]

There has been some experience with private bailiffs in this jurisdiction in the context of distress seizures, ie, seizure under a security instrument. Section 18 of the *Seizures Act* contemplates the court permitting seizure to be carried out by someone other than the sheriff. We do not believe that the experience is extensive.

We do believe that private bailiffs should not be used for enforcement seizures. The use of private bailiffs would require substantial supervision and quality inspection. We think that the public resources required for training, testing of qualifications, and supervision of the operations of private bailiffs would be better directed to the maintenance of high standards of competence and efficiency in the sheriff's office.

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[60] Letter from J. Coutts, President, Mortgage Loans Association of Alberta, to the Institute (October 7, 1986).

Moreover, the seizure process produces a situation that can potentially jeopardize the public peace. We consider it desirable that a public official, an officer of the peace who owes his or her first duty to the court and not to the creditor, carry out the seizure. We think that enforcement seizures in the context of a judgment debt are quite distinct from seizures under security interests, where the debtor has agreed that in the case of default the property will be removed from his or her possession.

We would recommend that there be no change in the present exclusivity of the sheriff's function in relation to seizure in enforcement proceedings.

RECOMMENDATION 25:

SHERIFF'S EXCLUSIVE AUTHORITY TO SEIZE

The present requirement that seizure must be carried out by the sheriff, or a person authorized by the sheriff, should not be changed.

(2) Territorial Authority

Under the present system, seizure instructions must be delivered to the sheriff of the judicial district in which the assets of the debtor are located. If the debtor owns assets in more than one judicial district, a separate writ of execution and separate seizure instructions must be delivered to the sheriff of each judicial district.[79] If the debtor's exigible assets are located just beyond the boundary of one sheriff's district, that sheriff has no authority to seize them.

Previously, we recommended that the binding effect of the writ of enforcement be province wide. All property of the debtor should be bound by the delivery of one writ of enforcement, regardless of where the debtor's property is in the province and, in particular, regardless of whether or not it is in the judicial district of the sheriff to whom the writ is delivered.

We think that it is the natural and logical extension of this recommendation that the authority of sheriffs to undertake enforcement process extend beyond the boundaries of their judicial districts to the boundaries of the province. A creditor should be able to deliver seizure instructions to any sheriff, and the sheriff receiving them should have the authority to effect seizure anywhere in Alberta.

The receiving sheriff should also have the authority to assign the instructions, or part of them, to any other sheriff if it is more convenient for that sheriff to effect all or part of the instructed seizure. The procedure for such assignments would be a matter for those in charge of the administration of the sheriffs' offices. It would be necessary for the assigning sheriff to give notice of the assignment to the instructing creditor so that he or she would know which sheriff to look to for a report.

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[79] ECA, s. 4(1)(3).

This recommendation, like the one regarding the province-wide effect of the writ of enforcement, depends on the development of appropriate computer technology, both in each sheriff's office and linking all sheriffs' offices.[71] As we envision the process, a sheriff who receives seizure instructions would enter these on the enforcement registry so that any sheriff in the province, or any creditor, would easily be able to determine what seizure activity was under way against any particular debtor at any given time.

RECOMMENDATION 26:

TERRITORIAL AUTHORITY OF THE SHERIFF

Each sheriff should have the authority to effect seizure anywhere in Alberta. A creditor should be at liberty to instruct any sheriff to effect seizure. If the sheriff receiving the instructions considers it more convenient that another sheriff carry out the instructions, or any part of them, then that sheriff should be able to assign the instructions, or any part of them, to another sheriff and give notice of the assignment to the instructing creditor.

C. Seizure Instructions

Written instructions from the creditor to the sheriff should continue to be required for the initiation of a seizure. At common law, no such instructions were necessary. The sheriff's duty was to proceed in accordance with the command contained in the writ of execution.

The present legislation, however, has introduced the anomaly that although the writ of execution commands the sheriff to make the amount of the debt out of the goods or land of the debtor, the sheriff must disobey this command until written instructions have been received from the creditor.[72] Our earlier recommendation, that the writ of enforcement authorize the sheriff to undertake such enforcement procedures as the creditor lawfully instructs, would remove the anomaly.

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[71] The sheriffs' offices in Edmonton and Calgary already use a sophisticated computer system for their internal operations. The recommendations that we make in this report would require only a slight refinement of those systems and their extension to the other sheriffs' offices.

We are advised that the various sheriffs' offices have differing requirements as to the form of the letter of instruction. There should be a standard letter of instruction that would be acceptable to all sheriffs.

RECOMMENDATION 27:

SEIZURE INSTRUCTIONS

Written instructions for seizure should continue to be required before the sheriff is obliged to initiate seizure. A standard letter of instruction acceptable to all sheriffs, should be developed.

(1) The Subsisting Writ

Under the present regime, only creditors who have filed a writ of execution with the sheriff can give the sheriff seizure instructions.[73] We would propose no change here; only creditors who have delivered a writ of enforcement to the sheriff should be allowed to instruct seizure.

The *Seizures Act* does not expressly require that the writ of execution of the creditor giving the sheriff instructions be subsisting when the instructions are given.[74] Section 29(1) requires the sheriff to disregard every writ in hand that is not subsisting when making a distribution of execution proceeds. It is not clear, however, whether the sheriff is to disregard seizure instructions received from a creditor whose writ is not subsisting.[75]

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[72] ECA, s. 4.

[73] Section 4(1) of the ECA provides that the sheriff is not to undertake seizure until instructed by an "execution creditor". The term is not defined, but we interpret it to mean a creditor who has filed a writ of execution.

[74] A writ is "subsisting" if it, or a renewal statement, was delivered within the preceding year. A writ must be subsisting for the creditor to share in distributions of enforcement proceeds.

[75] Practically, a creditor would be foolish not to make his or her writ subsisting before giving seizure instructions; otherwise, the amount of

(continued...)

Later in this report, in the discussion of the distribution of enforcement proceeds, we recommend the continuation of both the concept of the "subsisting" writ and the requirement that renewal statements be filed annually. The express requirement that a writ be subsisting for the sheriff to receive seizure instructions under it should be introduced to make the law clear and to give further support to the requirement that annual statements be filed. This is essential to keeping the sheriff's records as accurate as possible as to the total amount outstanding against an enforcement debtor.

RECOMMENDATION 28:

SEIZURE INSTRUCTIONS — SUBSISTING WRIT

The sheriff should not accept any seizure instructions from a creditor unless the creditor's writ is subsisting at the time the instructions are given.

(2) Content of Seizure Instructions

(a) Security

Of what should the seizure instructions consist? On this point, the legislation is largely silent. The only express requirement concerns indemnification of the sheriff. Section 4(2) of the *Execution Creditors' Act* provides:

> A Sheriff is not bound to make a seizure under a writ of execution until he has been furnished with security which he considers to be reasonably sufficient for indemnity in respect of
>
> (a) his fees, charges and expenses, and
>
> (b) any claims for damages that might be incurred by him in making the seizure and levy and anything done in relation thereto.

We deal with the subject of compensation for loss suffered in the course of enforcement proceedings, and the indemnity required of the creditor, in Chapter 11 of this report. There we propose basic principles for liability for such

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[79](...continued)
the writ would not be included in the amount levied by the sheriff and would not be included in a distribution. But it is not clear if a creditor can file a statement to make the writ subsisting after seizure was effected and share in the proceeds.

losses and the limitations on that liability. We recommend the establishment of an "assurance fund", which would be the exclusive source of recovery of loss for which there is liability.

We suggest that the assurance fund could be built up out of a small levy charged to the creditor on the filing of the writ of enforcement with the sheriff. In addition, where the creditor was responsible for a loss suffered by a third party, the creditor would be liable to indemnify the assurance fund for the amount it paid out for the loss. The Crown would be liable to indemnify the fund for payments made as a result of the wilful misconduct of a sheriff's officer.

The existence of an assurance fund would eliminate the need for security of the type contemplated by section 4(2)(b) of the *Execution Creditors' Act*. That requirement would be replaced by the assurance fund levy, paid at the time of registration of the writ of enforcement. Although the creditor would have essentially the same potential liability and obligation to indemnify as under the present system, he or she would not be required to give any security to the sheriff at the time of instructing enforcement. The experience of claims against the fund and of recoveries from creditors required to indemnify the fund would determine the amount of the levy.

One fortunate by-product of the arrangement that we propose would be the elimination of a point of friction between solicitors and sheriffs. Frequently, the security given to satisfy section 4(2) is an undertaking of indemnity from the creditor's solicitor to the sheriff. We understand that this is frequently the only form of security that the sheriff will accept. On the one hand, some solicitors consider it inappropriate that the willingness of the sheriff to accept seizure instruction should depend on the creditor's solicitor's willingness to guarantee the ability of the creditor to pay any damages that might arise out of the seizure process.

On the other hand, the sheriff considers the solicitor's indemnity the only practical way of proceeding. Most other forms of security, such as a bond or deposit from the creditor, would be too onerous on the creditor. Furthermore, the present procedure eliminates any need for the sheriff to assess the credit worthiness of the instructing creditor or the extent of the security required. Those functions can be performed more conveniently by the creditor's solicitor.

In our judgment, the present procedure is unacceptable. We believe that our proposal of an assurance fund eliminates any need to resolve the debate. The problem would simply cease to exist.

The only security that should be required to be given with the seizure instructions should be for the fees, charges and expenses of the sheriff. We do not think it unreasonable that the sheriff requires the solicitor's undertaking as security for these usually small and predictable sums.

RECOMMENDATION 29:

SECURITY

A creditor who delivers seizure instructions to the sheriff should be required to give security for the fees, charges and expenses of the sheriff in carrying out the instructions. The present requirement of security sufficient to indemnify the sheriff in respect of claims for damages incurred in making seizure should be replaced by an "assurance fund levy", paid at the time of filing the writ of enforcement with the sheriff as described in the recommendations below dealing with the establishment of an assurance fund.

(b) Information as to the debtor's assets

In practice, and in addition to the statutorily required indemnity, the seizure instructions usually include such information as the sheriff will require to attempt seizure, such as the location where the exigible assets of the debtor are likely to be found, and the documentation that the sheriff requires to effect seizure.

The practical requirement of providing information is not, however, a legal requirement. Professor Dunlop observes that:

> As the cases stand, it would appear to be wrong for the sheriff to refuse to seize simply because the creditor refuses to supply such information.[76]

The common law duty of the sheriff under a writ of execution included a duty to ascertain the location of the execution debtor's goods.[77]

Today, it is quite impractical to expect the sheriff to engage in the type of investigative function that, technically, the law would seem to require. Such a requirement would be inconsistent with the creditor-driven nature of the enforcement system. Creditors who fail to provide such information to the sheriff are bound to be disappointed. The statute should expressly require the instructing creditor to provide the sheriff with information necessary to support a seizure attempt.

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[76] Dunlop, *supra*, note 1 at 385.

[77] 17 Halsbury's Laws of England (4th) § 465.

Practically, the legislation cannot prescribe the specific information that a creditor must give to the sheriff. We think it sufficient if the requirement is expressed in general terms and is supported by the description of the sheriff's duty to attempt seizure. No duty to attempt seizure should arise until the sheriff is in receipt of information sufficient to support the attempt. When the sheriff does not have reasonably sufficient information the seizure instructions should be rejected. Determination of what is "reasonably sufficient" can be left to the sheriff, with such assistance as will undoubtedly develop through judicial interpretations of the provision establishing the requirement. At the very least, the creditor should identify a location where it is reasonable to expect to find assets belonging to the debtor.

RECOMMENDATION 30:

INFORMATION AS TO DEBTOR'S ASSETS

The creditor should be required to provide the sheriff with such information as the sheriff reasonably requires to attempt seizure. The sheriff should be under no duty to attempt seizure until in receipt of such information.

(c) Documentation

In practice, the creditor provides the sheriff with the documentation that is required to effect seizure. This includes the necessary copies of the notice of seizure in the appropriate form, and the notice of objection to seizure and a stamped envelope addressed to the sheriff. There is no provision in the *Seizures Act* that expressly requires the creditor to provide these documents with his or her instructions. The only requirement is that the sheriff have them when seizure is attempted.[78]

So that the entire process might be clear from the legislation, we recommend that the documentation requirement be included in the statement of the necessary contents of the seizure instructions.[79]

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[78] *Seizures Act*, ss 25, 26(1).

[79] Below we recommend continuation of the sticker procedure now established by s. 25. As stickers are not "required" to effect seizure, they are not among the documents that the creditor should have to provide to the sheriff.

RECOMMENDATION 31:

DOCUMENTATION

The seizure instructions should include such documentation as the sheriff will require to complete the instructed seizure.

D. Mechanics of Seizure

(1) How Seizure is Effected

The existing requirements for effecting seizure are a mixture of statutory and common law requirements. The statutory requirements are found in section 25(1) of the *Seizures Act*:

> (1) To effect the seizure of any goods or chattels under any writ of execution or under any distress, the person authorized to effect the seizure
>
> (a) shall serve on the debtor, and if there is more than one debtor, on each one of them, or on some adult member of his household,
>
> (b) shall attach to the goods to be seized or some or all of them, or
>
> (c) shall post up in some conspicuous place on the premises on which the goods or some part of them are at the time of seizure
>
> a notice in the prescribed form and a notice of objection to seizure in the prescribed form.

The prescribed form of notice of seizure begins, "Take notice that [the creditor] has caused the following goods to be seized to satisfy a claim against you for . . .".[80] Implicit in this is a requirement that the seized goods be identified in the notice of seizure. The description of the goods need not be too detailed, so long as it lets the debtor know just what has been seized, and what has not been seized:

> I think it is necessary for the sheriff, or his bailiff, or any person making a seizure to make it very clear what goods he is seizing. That is to say, the goods must be so designated, even in general terms, that

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[80] Alberta Regulation 491/81.

> they can be differentiated from any other goods of a similar kind that are on the premises.[81]

It is easy to imagine circumstances where it would be very difficult to describe seized property in a manner that would be sufficient to distinguish it from property that has not been seized. With such situations in mind, section 25(3)-(5) of the *Seizures Act* provides a "sticker procedure". In essence, it provides that the sheriff may attach a sticker ("in the prescribed form", of course) to seized "goods or chattels" that are not readily distinguishable from other similar goods or chattels. It is left up to the sheriff to decide whether to attach the stickers: nowhere in the act is it suggested that attaching the sticker is ever a prerequisite of a valid seizure.

From the wording of section 25, it might reasonably be concluded that all a sheriff's officer has to do to effect seizure is comply with the requirements of section 25. It has been held, however, that these requirements add to, rather than replace, the common law requirements for a valid seizure.[82] Both sets of requirements must be met, and they must be met simultaneously.[83]

The common law requirements for a valid seizure are less precise than are the requirements of section 25. Authoritative statements of the common law requirements tend to be couched in generalities. The two primary requirements seem to be that the sheriff's officer go to the premises or place where the property to be seized is located, and that the officer take some positive step to indicate that a seizure is being made. Halsbury's describes the requirements like this:

> For an act of the sheriff or his bailiff to constitute a seizure of goods it is not necessary that there should be any physical contact with the goods seized, nor does such contact necessarily amount to seizure. An entry upon the premises on which the goods are situate, together with an intimation of an intention to seize the goods, will amount to a valid seizure, even where the premises are extensive and the property seized widely scattered, but some act must be done sufficient to intimate to the judgment debtor or his

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[81] *R v. Luciuk* [1926] 3 W.W.R. 453 (Sask. K.B.). This case was concerned not with the contents of a written notice of seizure, but with what the bailiff must tell the debtor. Nevertheless, it does seem to be a good indication of what is required by way of description of the seized property in a written notice of seizure.

[82] *R.* v. *Vroom* [1975] 4 W.W.R. 113, per Clement J.A. at 121; *Pacific Finance Acceptance Co.* v. *Corbett* [1977] 2 W.W.R. 280 (Alta D.C.); *United Farmers of Alberta Co-operative Limited* v. *Foothills Sand & Gravel Ltd.* [1985] 5 W.W.R. 83 (Alta Q.B.).

[83] *United Farmers v. Foothills Sand and Gravel, ibid.*

> employees that a seizure has been made, and it is not sufficient to enter upon the premises and demand the debt. Any act which, if not done with the court's authority, would amount to a trespass to goods will constitute a seizure of them when done under a writ.[84]

Professor Dunlop expands on this "deliberately vague formula":[85]

> For a seizure to be effective, it is not necessary that the sheriff physically touch the goods, much less lock them up or take them away with him. What is required is that the sheriff must "be upon the premises where the goods are, or so close thereto, that if his authority to seize is disputed by one in actual possession he is in a position to lay hands on the goods". . . . It would appear that the sheriff must ascertain that the seized goods are in fact on the premises where he attempts to effect the seizure.[86]

The last proposition in this quotation is open to debate. Traditionally, the common law has not required that the sheriff see and individually identify each item that is to be seized. For example, in one leading case the sheriff was held to have effected a valid seizure simply by going onto the debtor's estate, which occupied an area of about five square miles, and informing two servants that everything was under seizure.[87]

Dunlop cites *R. v. Vroom*,[88] as authority for the proposition that the sheriff must ascertain that the property to be seized is on the premises. *R. v. Vroom* involved a criminal prosecution arising out of the accused's failure to deliver up property with respect to which he had signed a bailee's undertaking. By a majority, the Court of Appeal upheld the accused's acquittal, because the bailiff had not made sure that the goods he was purporting to seize were actually on the premises. This case does suggest that the sheriff's officer must ascertain at the time of seizure that the goods to be seized are in fact on the premises. Here, though, one must take to heart Professor Dunlop's own warning that decisions in criminal cases relating to seizure are not automatically applicable in other contexts.[89]

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[84] 17 Halsbury's Law of England, 4th ed., at para. 489.

[85] Dunlop, *supra*, note 1 at 374.

[86] *Ibid*. It is not clear how, if the sheriff's authority to seize were challenged, laying hands on the goods would establish that authority. Presumably, the goods could be removed if that were possible; however, the "laying on of his hands" would permit the sheriff to swear to the existence of the goods in any subsequent proceedings where the validity of the seizure was in issue.

[87] *Gladstone v. Padwick* (1871) L.R. 6 Ex. 203. The under-sheriff also left "his man" on the estate. At common law, if someone was not left with the seized goods, the seizure might very well be considered to have been abandoned.

[88] *Supra*, note 82.

A slightly different interpretation of the majority decision in *Vroom* is that it is but an application of the conventional rule that the sheriff must go to the place where goods are located in order to seize them. Whether or not any particular goods are at a particular place at the time of a purported seizure is a question of fact. If the sheriff does not make sure that a particular item is on the premises where a seizure is effected, and if its presence there is later put in issue, it could be difficult to prove, especially in a criminal case, that the item was in fact on the premises when it was supposedly seized.

We turn now to the question of how seizure should be effected in the enforcement system that we are proposing. Actually, for the "standard" seizure, our proposals regarding the method of effecting seizure really amount to fine tuning of the existing method. Our objective is to ensure that the method of effecting seizure fits in with the function and legal effects of seizure.

Seizure is the first step in a process by which specific property is taken from an enforcement debtor and sold or otherwise converted into money to be applied against the enforcement debt or debts. It transforms the somewhat vague and distant threat implied in the issuing of a writ into a very concrete indication that the debtor is at grave and imminent risk of losing specific property. By effecting seizure, the sheriff identifies the property that is liable to be sold (or otherwise liquidated) at the conclusion of the process.

Seizure has certain ancillary legal effects. Perhaps the most important of these is that it deprives the enforcement debtor of his or her right to sell or otherwise dispose of the seized property. Before seizure, the enforcement debtor is not actually prohibited from selling or otherwise disposing of property bound by the writ. The title of someone who buys property from the debtor may well be subordinate to the writ, but the sale is not unlawful. After seizure, the debtor is prohibited, on pain of criminal prosecution, from selling or otherwise disposing of the seized property.

It is important to note that we have said that seizure deprives enforcement debtors of the right to sell or otherwise dispose of the seized property, not that it deprives them of the power to do so. This is because we do not intend that the mere fact that property has been seized under a writ will affect the title of a third person who subsequently acquires the property from the debtor. Instead, the position of the third person relative to enforcement creditors will turn on the question of whether or not the third person's interest has priority over any relevant writs of enforcement. For the most part, seizure will have no bearing on this priority issue.[90] In this respect, our proposals follow the approach now taken by section 4 of the *Seizures Act*, as amended by the PPSA.

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[89] Dunlop, *supra*, note 1 at 373.

Given the function and intended legal consequences of seizure that we have just described, we believe that seizure should be effected in a manner that will accomplish two objectives:

(1) identification of the property that is being seized; and

(2) communication of the fact and primary legal consequences of seizure to the enforcement debtor.

It probably is desirable that some effort also be made to make the seizure known to third parties who might subsequently deal with the enforcement debtor. But this is not crucial, because persons who deal with the debtor in ignorance of the seizure will not be adversely affected by it. Such persons could be adversely affected by the binding effect of the writ, but this has nothing to do with whether or not the property has been seized.

In theory, there is no reason why the objectives of seizure could not be accomplished without the sheriff ever setting foot on or coming anywhere near the premises where the property to be seized is located. That is, the sheriff could effect seizure by identifying the property to be seized in the notice of seizure and serving it (along with the other seizure documents) on the enforcement debtor. This could fulfil both the "identification" and the "communication" objective. In fact, "seizure by notice" is proposed as an optional method of effecting seizure of serial numbered goods later in this chapter. In general, however, we propose to retain and put in statutory form the common law requirement that the sheriff attend at the premises where the property to be seized is located.

The sheriff's attendance at the place where the property to be seized is located can serve several useful purposes. In some circumstances, each of the following useful tasks can be accomplished only, or most effectively, by a sheriff who attends at the premises where the property to be seized is located:

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[90] We say, "for the most part" because seizure of property could have certain practical consequences. First, most of the situations in which a transferee of property that is bound by a writ can get priority over the writ depend on the third party's not knowing that the property is bound by a writ. We think that a transferee who knows that property has been seized should be treated in the same way as a transferee who knows that the property is bound by a writ. The former has at least as much warning about the danger of dealing with the owner as does the latter. Second, if property is seized and removed from the debtor's possession, it will be difficult for the debtor to transfer possession of the property to a third person or to sell it in the ordinary course of his or her business.

- describing and distinguishing the property to be seized;
- finding out who has possession of the property at the time of seizure;
- estimating the value of the seized property, so as to ensure that there is a reasonable relationship between the value of the property seized and the amount of the writ or writs;
- identifying exempt property;
- explaining the effect of seizure to the enforcement debtor or other person in possession of the property;
- obtaining a bailee's undertaking;
- removing the seized property, if necessary.

Taken together, these potential benefits of the sheriff's attendance at the premises where the property to be seized is located convince us that such attendance should be a required element of most seizures.

What does the sheriff need to do after arriving on the premises where the goods are located? The answer, we think, is that the sheriff should do what is necessary and possible to communicate both the fact and the scope of the seizure to the enforcement debtor. This can be accomplished by giving the seizure documents to the enforcement debtor. The seizure documents would include a notice of seizure that identifies the property being seized. The description of the property in the notice of seizure should make it clear to the debtor what property is at risk of being lost through the seizure process. The sheriff should continue to have the option of using the "sticker procedure" as a means of distinguishing seized from unseized goods.

Obviously, the sheriff cannot give the seizure documents to the debtor at the time of making the seizure if the debtor is not present. In such a case, the sheriff should be required to do one of two things. Preferably, the sheriff should give the seizure documents to another occupant of the premises or to someone who appears to have possession or control of the property. If no one of that description is present, the best the sheriff can do, for the moment, is post the documents or attach them to the seized property, as presently required by section 25 of the *Seizures Act*.

The preceding paragraph contemplates two situations in which seizure can be effected without the sheriff giving the seizure documents to the enforcement debtor at the time of seizure. One problem with either method is that it does not necessarily ensure that the enforcement debtor will receive prompt — or any —

notice of the seizure. Of course, if the documents are given to an adult member of the debtor's household, it is reasonable to assume that the seizure will promptly be brought to the debtor's attention. But if they are given, let us say, to a warehouseman with whom the debtor's goods are stored, or are simply posted on the premises or attached to the property, it is bold to assume that the debtor will receive prompt, or even any, notice of the seizure.

We believe that the consequences of the seizure process for the enforcement debtor are serious enough that all reasonable efforts should be made to bring the fact that a seizure has taken place to the debtor's attention. Therefore, unless the seizure documents are served on the enforcement debtor or an adult member of the debtor's household at the time seizure is effected, they should be served on the debtor after the seizure is effected. Service would not have to be accomplished within any particular time after seizure is effected; however, the time given to the debtor for filing a notice of objection would not begin to run until service is effected.

As for the manner of serving the seizure documents on the enforcement debtor, we believe that section 70 of the PPSA provides a suitable model. In the case of an individual debtor, this would require that the seizure documents either be left with the debtor (that is, hand delivered) or sent to the debtor by registered mail.[91]

Inevitably, there will be cases where it may not be practicable to serve the seizure documents on the enforcement debtor. In such a case, we think that the enforcement creditor should have the option of proceeding as if the debtor had been served, and had filed a notice of objection. The creditor would then bring an application for removal and sale. Ordinarily, this would also require service of various documents on debtor, but the court would be able to make any order necessary to deal with problems of service.

RECOMMENDATION 32:

EFFECTING SEIZURE

The method of effecting seizure should be set out in the statute, and for a "standard" seizure (seizure of non-serial number goods), should consist of the following requirements:

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[91] In fact, although one might quibble with some aspects of s. 70 of the PPSA, we believe that it provides a satisfactory model for the service of documents in our proposed enforcement system. Thus, our draft statute contains a "service of documents" section closely modelled on s. 70 of the PPSA.

(a) the property to be seized must be identified in the notice of seizure;

(b) the sheriff must go to the premises or other place where the property to be seized is located and do one of the following:

  (i) serve the seizure documents on the enforcement debtor, an occupant of the premises, or a person who appears to be in possession of the property; or

  (ii) if there is no one present upon whom the seizure documents can be served, post the seizure documents on the premises, or attach them to property that is seized.

The sheriff should continue to have the option of attaching a sticker to seized property in order to help identify it and distinguish it from property that is not seized.

If the seizure documents are not served on the enforcement debtor or an adult member of the debtor's household while seizure is being effected, they should be served on the enforcement debtor later.

Service of the seizure documents should be effected by one of the methods of service set out in section 70 of the PPSA.

(2) Entry onto Premises

If the sheriff is to enter onto the premises where the property to be seized is located, the law must give him the authority to do so. It must relieve him of what would otherwise be a trespass.

A variety of possible situations must be accommodated. The debtor's assets might be located on his or her own premises or they might be on the premises of a third party. The sheriff might not be able to gain entry without using force. The premises to be entered might be residential or non-residential. Different requirements might be called for, depending on the combination of factors that the sheriff faces.

It might also be necessary to reconcile the provisions regarding entry with the law protecting the fundamental rights of the person whose premises are to be entered. The Canadian Charter of Rights and Freedoms provides in section 8 that:

> 8. Everyone has the right to be secure against unreasonable search and seizure.

It has not been decided that this section applies to anything but searches and seizures in the context of criminal or quasi-criminal investigation; however, there is a significant possibility that it does. In the criminal investigation context, it has been held that section 8 of the Charter is violated unless there has been prior authorization from a neutral officer who relies on specific sworn evidence establishing the reasonableness of the intended search and seizure.[92] Does this have any impact on the system by which the sheriff's authority to enter and seize is established?

(a) The debtor's premises

The law regarding the sheriff's authority to enter is found partly in the common law and partly in the *Seizures Act*. It was established at common law that the sheriff had the authority to enter an open or unlocked exterior door to the debtor's residence but could not break the door to gain entry.[93] The *Seizures Act* gives the sheriff the power, not provided by the common law, to break the door to gain entry. Section 23 provides that the sheriff may break open the door of non-residential premises where it is not possible to effect seizure without doing so. In the case of a private dwelling house, a court order authorizing such a breaking open must first be obtained.[94] When the sheriff has gained entry to the premises, he has the authority at common law to break open the door to a room or other enclosure where exigible goods are kept. Halsbury's states:

> Once an entry has been made, the doors of particular rooms, cupboards or trunks may be broken open in order to complete the execution. It is not necessary to demand that inner doors, cupboards or trunks be opened before the breaking.[95]

We think that the present law provides satisfactorily for entry onto the debtor's premises to effect seizure, leaving aside for the moment the question raised by the Charter. We would recommend only that, for the sake of statutory completeness, the common law provisions be included in the statute.

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[92] *Hunter* v. *Southam Inc.* [1984] 2 S.C.R. 145.

[93] *Semayne's Case* (1604) 77 E.R. 194.

[94] *Seizures Act*, s. 23.

[95] 17 Halsbury's Laws of England (4th) § 467.

As to the requirements of the Charter, we think that the existence of an unsatisfied writ of execution against a debtor renders entry onto his or her premises to effect seizure reasonable, even though exigible assets might not be found there. If the sheriff has been given information that certain premises are "the debtor's premises", in the sense that he or she resides there or carries on business there, then a reasonable inference arises that exigible assets will be found on those premises. We think that the inference justifies the entry.

Moreover, we think that the inference is strong enough to pre-empt any need for independent pre-assessment of the reasonableness of entry, assuming that the requirement applies at all in this context.

We think also that the differences between entries in the context of criminal investigations, where considerations of the presumption of innocence and of the right to avoid self-incrimination are significant, and entries in the context of enforcement, where liability is not in issue and the opportunity for voluntary payment is available, render it unnecessary in the latter situation that the information upon which the sheriff proceeds be sworn.

(b) Third-party premises

As to the premises of a third party, it is necessary again to distinguish between residential and non-residential premises. If the sheriff is instructed that exigible property is located on a third party's non-residential premises, we think that the sheriff should be at liberty to enter onto those premises to effect seizure in the same manner that he can enter upon the debtor's premises, assuming that no force is required to gain entry. The concern should be for the privacy of the third party. We think that concern justifies limitation of the sheriff's right of entry in the case of a third party's residential premises but not in the case of non-residential premises that it is possible to enter without the use of force.

We believe that permitting the sheriff to enter non-residential third-party premises if he can do so without using force, and without requiring prior judicial consent, would not offend the requirements of the Charter. A non-forceable entry of non-residential premises would not be an invasion of privacy as most people understand that term, especially when the entry is made by an independent judicial officer such as the sheriff.

As to a third party's residential premises, the sheriff takes a considerable risk if he enters to effect seizure of the debtor's goods. Lord Denning described the law as follows:

> The law on this point seems to be now well settled that a sheriff's officer, when he goes into a *stranger's* house to execute process, enters at his peril, to this extent, that, if the defendant's goods are *actually* there that he is to take, or if the person is *actually* there whom he is to arrest, then he is justified by the event. But if the goods are not there or if the person whom

> he seeks is not present, then he is guilty of trespass. It seems illogical. It might be said that, if he had *reasonable cause* to think the goods were there or *reasonable cause* to think the person was there whom he sought, that should be sufficient justification. But it is not so, as I read the authorities. It would be putting far too much power into the hands of sheriff's officers or bailiffs if it was open to them to excuse an entry by saying that they had reasonable grounds. They might go and invade a person's house too easily without justification. Therefore, the law has made it plain that, to discourage them from any unwarranted intrusion, they are only justified if they are sure the person is there or the property is there. They are only justified if that in fact proves to be the case.[96]

We think that the means by which the common law protects the third party's privacy in the case of residential premises is unwieldy. Placing the sheriff, and the creditor, at risk of liability if there is no exigible property of the debtor on the premises might inhibit unwarranted intrusions, but it will also facilitate the sheltering of exigible assets. A better way to provide the third party with the same, or even additional, protection would be to require the sheriff to obtain prior judicial authority to enter onto the residential premises of a third party by establishing to the satisfaction of the court that it is reasonable to expect that exigible goods of the debtor will be found there. We think also that, where force is required to enter a third party's premises, a court order should be required regardless of whether the property is residential or non-residential. In the case of the debtor's premises, an inference arises that, because they are the debtor's premises, the debtor's property will be located there. Such an inference does not arise in the case of third-party premises. We think that before the sheriff enters the residential premises of a third party, or uses force to enter any third-party premises, the court should assess the reasonableness of the proposed entry. We think that this requirement will satisfy any possible Charter concerns in this context.

In summary, therefore, the changes that we propose to the existing law are that the sheriff be required to obtain an order before entering the residential premises of a third party and before using force to enter the non-residential premises of a third party. In all other respects, we would not alter the present law.

(c) Security and compensation

Finally, where the sheriff gains entry by the use of force, we think that he should have an express obligation to ensure that the premises are secure when he leaves, and the third party should have a right to compensation for the cost of repairs required because of the forceable entry, unless it is unreasonable that compensation should be paid. For example, it would probably be considered unreasonable to order payment where the third party was colluding with the debtor to frustrate the seizure attempt. The mechanics for the making and paying of a claim for compensation are discussed in Chapter 11.

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[96] *Southam* v. *Smout* [1963] 3 All E.R. 104 at 109.

RECOMMENDATION 33:

ENTRY ONTO PREMISES

Entry:

The sheriff should have statutory authority to enter onto the debtor's premises, or the non-residential premises of a third party, to effect seizure.

Unless he has the consent of a third party to enter a third party's residential premises to effect seizure of the debtor's property, the sheriff should have the authority of a court order to do so. Such an order should be granted where there is a reasonable likelihood that exigible property of the debtor is located on the premises of the third party.

Use of Force:

The sheriff should be able to use force to gain entry to the debtor's non-residential premises without a court order.

Forcible entry to any other premises (the debtor's residence or any premises of a third party) should require a court order.

After gaining entry, the sheriff should be able to break an interior door or other closure to gain access to the debtor's property.

Where the sheriff uses force to gain entry to any premises for the purpose of seizure, he should take reasonable care to ensure that the property is secure when he leaves.

Damages to Third Party:

A third party who suffers damages as a result of a forced entry should be compensated unless the third party could reasonably have prevented the damage.

(3) Time of Seizure

Section 18 of the *Seizures Act* provides that in the case of distress for rent a seizure cannot be made except between 5 am and 8 pm. The section makes no distinction between seizures at residential premises and seizures at commercial premises, but it seems likely that the policy intent was to protect the privacy and peace of residences.

There is no similar restriction as to the time of day when seizure under a writ of execution can be effected. We believe that the policy represented by section 18 is as appropriate in the case of judgment enforcement as it is in the case of lease enforcement. The peace and privacy of a judgment debtor is entitled to at least the same degree of protection as that of a defaulting tenant. The protection is warranted, however, only in the case of seizures on residential premises and, like the section 18 provision, it should be subject to contrary order by the court.

As to the particular hours of restriction, we note that the *Collection Practices Act* section 13(1)(j) prohibits dunning telephone calls between 10 pm and 7 am. The Criminal Code section 448 calls for search warrants to be executed by day unless the justice authorizing the warrant authorizes its execution by night. Day is defined in the Code as "the period between six o'clock in the forenoon and nine o'clock in the afternoon of the same day."[97] We expect that most Albertans would consider either of these ranges, rather than the ones set out in section 18 of the *Seizures Act*, to be the hours during which respect for peace and privacy is appropriate. We propose that the Criminal Code hours be adopted for seizure, because the type of activity involved is more akin to the execution of a search warrant than the making of a dunning telephone call.

RECOMMENDATION 34:

TIME OF SEIZURE

Unless the court orders otherwise, no seizure under a writ of enforcement should be permitted on residential premises between the hours of 9 pm and 6 am.

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[97] Criminal Code, R.S.C. 1985, c. C-34, s. 2.

(4) Bailee's Undertakings

Section 16 of the *Seizures Act* provides:

> The sheriff, at any time after making a seizure of goods under a writ of execution or by virtue of a power of distress, may appoint the debtor or some other person as his agent to hold and keep the goods so seized for and on behalf of the sheriff, on the debtor or other person signing an undertaking to hold the goods as bailee for the sheriff and to deliver up the possession thereof to the sheriff on demand.

The undertaking obtained pursuant to this section is usually called a bailee's undertaking. A form for the undertaking is commonly printed on the back of the notice of seizure in the following words:

> In Consideration that the goods and chattels seized and mentioned in the Notice herein being left in my possession, I agree and undertake to hold and keep the goods and chattels so seized as agent and bailee of and on behalf of the Sheriff without charge, and to produce and deliver up the possession thereof to the Sheriff upon demand.

The procedure is used extensively. In our empirical study, we found that a bailee's undertaking was obtained in 65% of the cases where seizure was effected. In 72% of these cases, the undertaking was obtained from the debtor, in 9% from a member of the debtor's family, and in the remaining 19% from a third party.[98]

The bailee's undertaking serves an extremely useful purpose in the enforcement system. It gives the debtor one more chance to pay the judgment debt voluntarily, having been encouraged to do so by the fact of seizure and the prospect of imminent removal of the seized property. It facilitates maintenance of the status quo while the debtor objects to the seizure. Removal and sale of the seized property can be delayed without inefficient use of the sheriff's resources.[99]

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[98] Research Paper, *supra*, note 3, Table 27 at 121.

[99] In *National Commercial Bank of Scotland* v. *Arcam Demolition* [1966] 3 All E.R. 113 (C.A.), Lord Denning M.R. observed:

> It was one time thought that, in order to retain possession, the bailiff, as the sheriff's officer, must actually remain in the house with the goods. He used to sit down in the kitchen and make himself at home; but that has long since been regarded as

(continued...)

We mentioned previously that the lack of protection for third parties who purchase seized property from a debtor who has custody of the property under a bailee's undertaking was remedied by the PPSA amendments to the *Seizures Act*, which we recommend be continued in the reformed legislation. This problem having been removed, we do not think that the bailee's undertaking procedure is in need of substantial reform.

The present form of bailee's undertaking does not indicate to the bailee the liabilities and penalties that flow from a breach of the undertaking. The *Seizures Act* provides that a defaulting bailee is "liable to attachment",[100] and could be liable to civil contempt proceedings. We believe that the form of undertaking should inform the bailee of these consequences.

RECOMMENDATION 35:

BAILEE'S UNDERTAKINGS

The existing bailee's undertaking procedure should be continued in the reformed legislation. The form of undertaking should inform the bailee of the consequences of a breach of the undertaking.

(5) Registration of Notice of Seizure in the Enforcement Registry

When seizure has been effected, the sheriff should be required to enter a notice to that effect in the enforcement registry. This will ensure that the integrity of the registry as a complete record of all enforcement activity taken against any particular debtor will be maintained. We do not intend that a seizure would be invalid or in any way defective until such registration was effected. The registration requirement is simply intended to ensure that the record of enforcement activity is complete.

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[99](...continued)

> unnecessary. It is sufficient if he visits the house frequently to make sure that the goods are safely there and not removed. He then still retains possession; but he need not even do as much as that—he need not visit the house—if he gets an agreement by some responsible person in the house to see that the goods are not removed.

[100] "Attachment" in this context means arrest.

RECOMMENDATION 36:

REGISTRATION OF NOTICE OF SEIZURE

After effecting seizure, the sheriff should enter the notice of seizure into the Enforcement Registry.

E. Enforcement Against Serial-numbered Property

It has been said that the seizure process should be designed with particular attention to the situation where it is most often used—the seizure of motor vehicles. Our empirical study revealed that, in 65% of the seizure cases that we examined, the property seized was a motor vehicle, and in 5% it was a near relative of the motor vehicle—farm machinery.[101] It appears that the seizure process is used most often to enforce against property that is identified by serial number.

We have previously noted that the PPSA provides that the registration of encumbrances against some types of property requires that the property be described by serial number. This necessitated an exception to the cloud aspect of the binding effect of the writ in the context of "serial-numbered property". We think that it also facilitates a streamlining of the seizure process as it applies to such property.

Where the debtor owns property against which encumbrances can be registered in the PPR by serial number, the first function of seizure, identifying the property against which enforcement proceedings are being taken, can be accomplished by the registration of the notice of seizure by the sheriff against the property, described by its serial number, in the PPR. Such registration would provide certainty as to which property was being subjected to enforcement processes.

This procedure would eliminate the requirement that the sheriff attend upon the premises where the property is located. Enforcement against motor vehicles, for which there is an owners' registry, would become simple. It is true that independently obtained certainty as to the existence of the property, usually provided through the sheriff's entry onto the property, would be lost. We think that in the case of serial-numbered goods, particularly ones for which a current owner's registration exists, this price is not too great. Because registration would not accomplish the second function of seizure, it would still be necessary to serve the debtor with the notice of seizure.

Of course, the creditor will not always be able to determine the serial number of the debtor's property before instructing seizure. The proposed procedure must therefore be an alternative only; however, if enforcement against serial-numbered property is accomplished in the ordinary way, by "physical" seizure, third parties will not be affected until the writ of enforcement is registered against the property described by its serial number, even though that writ might have been previously registered against the name of the debtor. In other words, the serial-numbered property exception to registration of the writ in the PPR, which we discussed previously, should continue notwithstanding seizure of the property.

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[101] Research Paper, *supra*, note 3, Table 26 at 118.

RECOMMENDATION 37:

SEIZURE OF SERIAL-NUMBERED PROPERTY

As an alternative to the regular seizure procedure, seizure of serial-numbered property should be effected by registration of a notice of seizure that describes the property by its serial number in the PPR. Such registration should be followed by service of the notice of seizure on the debtor.

Where serial-numbered property is seized by the ordinary seizure process, the exception to the effect of registration of the writ of enforcement in the PPR should continue until the writ is registered against the serial number of the seized property.

F. Enforcement Against Property in the Hands of a Third Party

Occasionally, the debtor's property might be out of the debtor's possession and in the hands of a third party, where, for example, the property has been lodged with a custodian for storage or for safe keeping. In some contexts, this will be the normal situation. For example, security certificates are often kept by the owner's broker or by the issuer.[102]

In effect, such circumstances parallel the situation in which garnishment operates. In the garnishment situation, the asset to which the creditor wishes access (the debt owed to the debtor) is held by a third party (the garnishee) who is under a legal obligation to the debtor (to make payment). In the situation that we are addressing now, the asset (for example, corporate share certificate) is held by a third party (the broker) who is under a legal obligation to the debtor (to hold them as instructed).

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[102] Actually, to say that security certificates are often held by brokers or issuers does not begin to describe the complications that are likely to arise in connection with the seizure of this sort of property. We discuss these complications at considerable length in Section B of Chapter 5.

We think that enforcement against property in the hands of a third party can be handled by a process similar to garnishment. The creditor would instruct the sheriff to issue a written demand to the third party either to forward the asset to the sheriff or to make it available for seizure. From the time the third party is in receipt of the demand, the obligation to ensure that the property is delivered to the sheriff should be substituted for and should override his obligation to the debtor. In effect, the procedure would make it possible for the sheriff to require the third party to do anything that the debtor himself could have required the third party to do.

If the third party fails to comply with the sheriff's requirement, the creditor should have the right to seek judgment against the third party for the amount that would have been contributed to the satisfaction of the debtor's debts had the third party complied. The third party should be compensated for his or her expenses in complying with the sheriff's notice. Following seizure of the property, the sheriff would be obliged to serve the debtor with the notice of seizure and other documentation as in the ordinary process.

Of course, this process would be an alternative to ordinary seizure. If seizure could be effected without the notice, there would be no need to give it.

The Law Reform Commission of British Columbia proposed a process of this type for enforcement against shares,[103] and the Ontario Law Reform Commission made a similar proposal for negotiable instruments found in the possession of a third party (as custodian for the debtor and not as a holder in due course from the debtor).[104] We adopt the proposal advanced by the two Commissions and propose that the process be implemented generally for all types of property found in the custody of a third party.

RECOMMENDATION 38:

PROPERTY IN THE HANDS OF A THIRD PARTY

As an alternative to seizure by the ordinary process, where property of the debtor is in the hands of a third party, the sheriff, on the creditor's instruction, should issue a notice for service on the third party, requiring

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[103] Law Reform Commission of British Columbia, Working Paper No. 55, *Execution Against Shares* (Vancouver: LRCBC, 1987), at 47 [hereinafter LRCBC Shares].

[104] OLRC Part 2, *supra*, note 57 at 53.

the third party to deliver the property to the sheriff or to make it available for seizure.

The process should operate in a parallel manner to the process of garnishment of debts owed to the debtor. For example, the third party should be required to respond to the notice if unable to comply with it, and should be liable in the same manner as a garnishee if he or she fails to respond or comply. Compliance with the requirements of the notice should relieve the third party of his or her obligation to the debtor. The third party should be compensated for the cost in complying with the sheriff's requirements.

G. Objection to Seizure

A unique feature of the enforcement process in Alberta is the procedure by which the debtor can object to seizure.[105] When the notice of seizure is served on the debtor it is accompanied by a notice of objection form and an envelope addressed to the sheriff and stamped with sufficient postage. To invoke the objection procedure, the debtor need only sign the Notice of Objection and mail it within 14 days of the seizure.[106] If the debtor does this, the creditor cannot proceed to instruct the sheriff to remove and sell the seized property without first obtaining authorization from the court through an "application for removal and sale".[107] On hearing the application, the court will deal with the debtor's objections and can grant or refuse the application, impose terms, or suspend the proceedings to give the debtor the chance to pay the debt by instalments.[108]

The objection process is used extensively by debtors. In our empirical study, we found that a notice of objection was filed in 56% of the cases where seizure had been effected. An application for removal and sale was made in only 53% of the cases where an objection had been filed, and an order for removal and sale was made in 75% of the applications.[109]

What explanation can be made for the substantial number of cases where there is no application for removal and sale following the filing of an objection?

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[105] *Seizures Act*, ss 26-29.

[106] *Ibid*. s. 27.

[107] *Ibid*. s. 29(1).

[108] *Ibid*. s. 29(5).

[109] Research Paper, *supra*, note 3, at 121.

We doubt that anywhere near 47% of the objections were valid.[110] It could be that, in many cases, the debtor filed the objection and soon thereafter paid the debt so that no application was necessary. Filing the objection is the last inexpensive delay step that can be taken before the property can be taken away. The debtor files merely to preserve the status quo while arrangements are made to make payment. To the extent that this is the explanation, the objection procedure neither helps nor hinders the creditor. The only help that it gives to the debtor is a few days of delay.

It could also be that, in many cases, no application is made because the creditor discovers after seizure that there are outstanding encumbrances against the seized property and that the debtor has insufficient equity to justify the creditor proceeding.

It is also possible that the low number of applications following objections results from the creditor simply giving up at this point. An application for removal and sale, which involves counsel appearing in court, is expensive when compared to all the steps that precede it, all of which can be accomplished by merely filing documents with the sheriff. Seen in this light, the objection process is a means by which the debtor can frustrate creditors.

Some features of the objection process make it a particularly well-suited frustration weapon. It is amazingly easy for the debtor to invoke the process. The debtor is supplied with the form, already completed with everything except the debtor's signature, and is given a stamped, addressed envelope. The debtor is not required to state a reason for objection and is not required to take any initiative to have the matter brought before the court. The intent is to minimize the procedural obstacles to the determination of the objections of unsophisticated debtors.

A case can be made that the present objection procedure, in providing an easy inexpensive means by which a debtor can make an objection, has the effect of encouraging frivolous objections that result in a waste of both court time and creditor money. The only hurdle placed before the debtor is that the objection must be filed within 14 days of the seizure. Even then, if that deadline is missed, the objection will be accepted after the 14 days if the sheriff has not sold the seized property.[111] The only risk that the debtor takes in filing a frivolous objection is that the cost of the creditor's application for removal and sale will be added to the amount of the judgment the creditor is trying to collect. Compared to the certainty of losing the seized property, that risk might seem insignificant to many debtors.

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[110] In fact, in *Carmar Holdings Ltd.* v. *Harpe* (1976) 23 Alta. L.R. (2d) 76 (Alta. D.C.), the court gave the likelihood that a seizure effected by the sheriff will not be objectionable the status of an evidentiary presumption.

[111] *Re Industrial Acceptance Corp.* (1960) 32 W.W.R. 547 (Alta A.D.).

Even so, the statistics indicate that in 25% of the applications for removal and sale no order was granted. If there was a valid objection to seizure, in even half those cases, a simple procedure whereby a debtor can ensure an objection comes before the court would seem appropriate.

In addition, we think that the objection procedure presents an extremely good opportunity to ensure that the debtor knows exactly what is going on and the extent of his or her rights. For that reason alone, we consider it a valuable feature of our enforcement system.

Furthermore, we think that the objection procedure provides a good method of extending to the parties an opportunity to have a reasonable payment plan designed for the particular situation. As we noted above, where the debtor has the means to pay over time, and it is in all other respects reasonable to do so, the court can suspend the removal and sale while the debtor makes payments.[112] It is not, we believe, frivolous for the debtor to object to seizure on such grounds. The imposition of an instalment payment plan amounts practically to the substitution of a remedy in the nature of continuing garnishment for seizure. We think that this is appropriate where the court concludes that the circumstances justify it. We think that this is a valuable feature of the existing objection procedure.

The challenge, therefore, is to improve the objection procedure, so that frivolous objections are discouraged, while maintaining its present simplicity and accessibility.

We have considered whether the solution is to require the debtor to bring application to have an objection heard rather than simply to file a notice of objection. This would have the effect of requiring the debtor to take the initiative to a far greater extent than is the case now. Under the present procedure, the creditor is required to take the initiative to have the matter brought before a judge.

We found that it was impossible to design a procedure, however, that did not require significantly greater sophistication on the part of the debtor than we think it is reasonable to expect. It would be easy to design a simple document whereby the objection and desire for a hearing would be communicated by the debtor to the sheriff. Difficulty arises, however, because it is also necessary to include in the procedure a means of setting the court appointment for hearing the objection and communicating the particulars of the appointment to all concerned. We were unable to come up with a simple enough method whereby that could be accomplished. To require the debtor to make those arrangements and to communicate them to the creditor would be, we considered, too much to expect. In most cases, it would require the debtor to retain a lawyer.

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[112] For an example of the court exercising this discretion, see *Paccar of Canada* v. *Canadian Concrete*, Alta. Q.B., unreported, May 1, 1984.

We think that the simplest method of accomplishing this part of the process is the existing method, which relies on the initiative of the creditor. We have concluded, therefore, that the present objection procedure, notwithstanding that it might invite frivolous objections, should be retained.

What then can be done to discourage frivolous objections? We offer three suggestions. First, when the notice of objection is served on the debtor, it should be accompanied by a document, which might be called "Instructions to Debtor".[113] This would include a clear and simple explanation of the seizure process; a description of the exemptions to which the debtor is entitled; a description of the procedure whereby such objections are dealt with, including the courts' power to order payment by instalments and the debtor's potential liability for costs; and advice on where the debtor can go for assistance with the procedure.

Second, the debtor should be required to state the nature of the objection in the notice of objection that is filed with the sheriff. We do not suggest, however, that a filed objection that gives a clearly inadequate reason, or is silent on the reason for the objection, should be rejected by the sheriff. Rejection of such an objection would be too harsh. The debtor should not be restricted to the reason given in the objection form and should be able to raise any other reason at the removal and sale application. We think that the sanction for failure to set out a reason or for setting out an obviously frivolous reason should be costs.

Third, there should be a deadline for the filing of the notice of objection. Section 27(1) provides that the notice of objection "shall" be delivered to the sheriff within 14 days of the seizure. Section 29(1) requires the sheriff to notify the creditor when he receives a notice of objection and then provides what the creditor must do to continue enforcement against the seized goods.

In *Re Industrial Acceptance Corp.*,[114] it was held that the sheriff must notify the creditor even if the notice of objection is received after the 14-day deadline, and the creditor must make his application as if the notice of objection had been delivered in time. Under the present procedure, the notice of objection will be accepted if received anytime before sale. If the creditor has instructed sale proceedings, they will be stopped and the sale delayed while the creditor applies for the sale order. It is possible that considerable expense will have been incurred by then in relation to the removal and sale. It is not an entirely satisfactory answer that the debtor will be liable for that expense if his objection proves groundless.

We think that the objection deadline provision has been given a more generous interpretation than is appropriate. The objection procedure is already extremely generous. We think that removing the objection deadline makes it more generous than was intended. We propose that the sheriff be instructed not to accept an objection after 14 days from service of the notice of seizure on the debtor, except where the debtor obtains a court order requiring the objection to be accepted.

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[113] These instructions might well be printed on the back of the notice of seizure that is served on the debtor.

[114] *Supra*, note 111.

There are two aspects of the removal and sale application procedure that we would alter. First, there is at present no restriction as to the judicial district in which the application for removal and sale may be made. It is possible for a creditor to cause a debtor considerable inconvenience by bringing the application in a judicial district distant from that in which the seizure occurred. We think that the silence of the rules on this point creates a potential for abuse of debtors, and therefore we recommend that the creditor should be obliged to bring the application for removal and sale in the judicial district in which the seizure occurred unless the debtor otherwise consents or the court otherwise orders.

Second, we understand that at present if a debtor wishes to co-operate after a seizure and permit the seized property to be removed and sold before the deadline for objection has passed, an objection to seizure must be filed so that the creditor can bring application immediately and a consent order can be entered. This is unreasonably clumsy, and we propose that the debtor should be able to consent to the removal and sale of the seized property anytime after seizure.

RECOMMENDATION 39:

OBJECTION PROCEDURE

At the same time as the debtor is served with the notice of objection to seizure, he or she should also be served with a document called "Instructions to Debtor", which should include:

a. a simple explanation of the seizure process;

b. a description of the exemptions to which debtors are entitled;

c. an explanation of the court's power to delay removal and sale if the debtor can establish that he or she can pay the debt over time;

d. a description of the process whereby objections are brought before the court to be dealt with;

e. advice as to where the debtor might seek advice and assistance; and

f. a statement that the debtor might become liable for added costs if he or she uses the objection procedure frivolously.

The debtor should be required to state the nature of his or her objection to the seizure in the notice of objection. The sheriff should not reject any notice of objection that states an obviously inadequate reason or is silent as to the reason. The debtor should not be restricted to the reason given on the notice of objection at the removal and sale application.

The sheriff should be required to reject any notice of objection delivered to him more than 14 days after the date of service of the notice of seizure on the debtor, except where otherwise ordered by the court.

The existing procedure of a court application initiated by the creditor who wishes to challenge the debtor's objection should be retained.

The creditor should be obliged to bring the application for removal and sale in the judicial district in which the seizure occurred unless the debtor otherwise consents or the court otherwise orders.

The debtor should be able to consent to the removal and sale of seized property anytime after seizure.

H. Removal

Section 31(1) of the *Seizures Act* provides:

> Notwithstanding anything in this Act, a sheriff
>
> (a) who has lawfully seized goods under a writ of execution or under a power of distress, and
>
> (b) who believes that it is necessary or advisable that the goods be taken by him and removed,

> may, in his discretion, make any removal and disposition of the goods that he considers necessary without order.[115]

Usually, the sheriff will not remove the property but will leave it with the debtor on a bailee's undertaking, unless the creditor has specifically instructed removal at the time of seizure and has made arrangements with the sheriff for storage of the property during the period when an objection to seizure might be received.

It might be that, under section 31(1) of the *Seizures Act*, the sheriff has the discretion to refuse to remove when instructed by the creditor. We do not think that he should have such a discretion where appropriate arrangements for storage of the property have been made and the sheriff is secured for the costs of removal and storage

When the sheriff removes the seized property from the debtor, whether it is at the time of seizure or on the later instruction of the creditor or authorization of the court, the sheriff provides to the debtor an inventory of the property removed. In effect, he gives the debtor a receipt for the property. We see no need to change this procedure either.

In both cases, however, the statute is silent. We propose that the present practice be expressed in the reformed statute.

RECOMMENDATION 40:

REMOVAL

The sheriff should be required to remove seized property from the debtor, at the time of seizure or anytime thereafter, upon receiving from the creditor instructions to that effect and such security as the sheriff requires to ensure that the cost of removal and storage of the property pending sale is covered.

Where the sheriff takes possession of seized property from the debtor, he should provide the debtor (or whoever was in possession of the property) with a written inventory of the property removed.

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[115] Presumably, "disposition", in this section, does not include sale.

I. Sale

After the time for objection expires, or after the court has given an order authorizing removal and sale, the creditor may instruct the sheriff to sell the seized property.[116] Unless the court otherwise orders, execution sales are by public auction or tender.[117] Both the creditor and the debtor are given notice of the sale 10 days before it occurs.[118] There are also requirements for public notice or advertising of the sale.[119]

If no bids are received at the sale or if those that are received are, in the sheriff's opinion, inadequate, then the sheriff may adjourn the sale.[120] A new notice announcing the second sale must be given to the creditor, debtor and public if the adjournment is longer than seven days.[121]

If the seized property has been offered for sale by tender or auction and remains unsold, the sheriff may sell it by private sale, so long as the price obtained is fair and reasonable.[122] It is not clear if such a sale can take place only after the first attempt at a sale by auction has been adjourned and a second attempt has been made. The sheriff may sell at an unreasonably low price if no reasonable price can be obtained, but first he must obtain a writ *venditioni exponas* from the court pursuant to Rule 368.[123]

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[116] *Seizures Act*, s. 30.

[117] *Ibid*. s. 14.

[118] *Ibid*. s. 14(2).

[119] *Ibid*. s. 14(3).

[120] *Ibid*. s. 32(1).

[121] *Ibid*. s. 32.

[122] *Ibid*. s. 33.

[123] Rule 368:

> Upon a return by the sheriff of goods or lands on hand for want of buyers, a writ of *venditioni exponas* may be issued for the sale of the goods or lands and the original writ of execution remains in force for the residue.

For a form of such a writ, see Stevenson and Cote, *Annotation of the Alberta Rules of Court* (Edmonton: Juriliber, 1981), at 358.

(1) Sale Instructions

At present, it is not possible for the creditor to instruct sale at the time that he or she instructs seizure.[124] Two separate instructing letters are required. We are advised by the Edmonton sheriff's office that it would create an unnecessary administrative burden on the sheriff's operations if this procedure was changed and the creditor could instruct sale at the same time that he or she instructs seizure.

In any case, we consider the present requirement desirable. The seizure process achieves much of its effectiveness by operating as an inducement to the debtor to make voluntary payment. Its effectiveness in that role might well be impaired if sale could be instructed at the same time as seizure. We expect that more seizure sales would result, and, although probably about the same level of creditor satisfaction would be achieved, it would be at a considerably greater cost. We would not alter the requirement of separate instructions for sale.

RECOMMENDATION 41:

SALE INSTRUCTIONS

The sheriff should not proceed to sell the seized property until he has received written instructions from the creditor to do so.

(2) Method of Sale

The goal of the execution sale process is to secure as high a price as possible for the debtor's goods. There has been considerable debate in the past as to whether that goal is well served by the provisions, which prescribe sale by auction or tender unless some other method is ordered by the court. The conventional wisdom that sheriffs' auctions are not effective in producing good value for the property sold has been disputed. In his response to our Report for Discussion, the deputy attorney general of Alberta said:

> It is our view that sale by the Sheriff of seized goods is carried out in an efficient and effective manner. With few exceptions, market value is received on

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[124] *Seizures Act*, s. 30(1). The section does not explicitly say that the instructions to sell cannot be given before the objection period is over, but the practice of the sheriffs is to so interpret it.

> items sold by the Sheriff. In many cases seized assets are sold at the same auction sale as other goods.[125]

We think, however, that the present provision unnecessarily limits the ability of the sheriff to use other methods of sale where the circumstances are appropriate. The provision requires that the alternative be approved by the court.

We think that the creditor should suggest a method of sale at the time that he or she instructs sale. The experience and expertise in the sheriff's office is the best resource for determining the best means of sale. The sheriff should be given the latitude to use the creditor's suggestion, or to use whatever other method of sale that he thinks will produce the best return.

We think that it is a sufficient safeguard if the sheriff is obliged to include a statement as to the method of sale that he intends to use in the notice that he gives to both the creditor and the debtor. Either the creditor or the debtor should be able to bring application to the court within 14 days to challenge the sheriff's proposal if either thinks that there is a better alternative.[126]

To ensure that the sheriff can use the best method of sale, he should be able to retain such experts, consultants or agents as he considers necessary and reasonable, given the nature of the property to be sold. Of course, this must be subject to the instructing creditor's willingness to indemnify the sheriff for the expense involved. Similarly, we think that the nature of the public notice and advertising should be left to the sheriff.

The requirement of a court authorization for a sale at a price unreasonably below value should be preserved, but we think that the time has come to abandon the Latin label—*venditioni exponas.*[127] We believe that the legislation should permit the creditor to apply for an order permitting sale at any price where a reasonable price cannot be obtained; however, such application should not be necessary if the fair value of the property in the sheriff's opinion is less than $1000. In such a case, he should be at liberty to sell without such application.

We do not consider the significant authority given to the sheriff for the conduct of enforcement sales to be inconsistent with our recommendation that the enforcement system be creditor driven. The system that we propose is entirely creditor initiated; however, several aspects of it, including the conduct of seizures and the conduct of sales, though creditor initiated, are sheriff managed.

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[125] Letter from D.W. Perras, Q.C., Deputy Attorney General of Alberta, to the Institute (November 13, 1986).

[126] Failure of the debtor to object to a proposed method of sale would not estop him or her from objecting later to an improvident sale. That the proposed method of sale was satisfactory does not necessarily mean that the sale was carried out as it ought to have been.

[127] Rule 368.

RECOMMENDATION 42:

METHOD OF SALE

The creditor should suggest a method of sale at the time that he or she instructs sale. The sheriff, after considering the creditor's suggestion, should use whatever method of sale he thinks will produce the best price.

The sheriff should be able to retain such expert assistance as he reasonably requires to effect a sale, subject to the creditor's willingness to indemnify him for the costs involved.

The sheriff should give the debtor and the creditor notice before the proposed sale, indicating the method of sale that he intends to use. Either the creditor or the debtor should have the right to apply to the court within 14 days of the notice for directions if either objects to the method of sale proposed by the sheriff.

If the sheriff cannot obtain a reasonable price for the property, the creditor should be able to apply to the court for authorization to sell at whatever price the property will bring, except where the reasonable value of the property is less than $1000, in which case the sheriff should be at liberty to sell at the best obtainable price without application.

(3) Sales to the Creditor

We have considered whether there should be any restriction or prohibition of sales to the creditor. The *Seizures Act* is silent on the subject, but the common law permits the creditor to be a buyer. Dunlop describes the common law as follows:

> A sheriff cannot deliver seized goods to the execution creditor in satisfaction of his debt, but it is proper to sell the property to the creditor or to the debtor. A

> sale to the creditor will be scrutinized carefully by the court and will be set aside where it amounts to a sham sale or "a conspiracy to despoil the plaintiff [debtor] of his property". [*Phillips* v. *Bacon* (1808) 103 E.R. 587, at 589.][128]

We think that the common law is adequate where the creditor buys at a public auction, or by tender. But where the sheriff has chosen to sell by private sale to the creditor, we think that the sale should not be concluded unless the price bears a reasonable relationship to the market value of the property[129] and the sheriff has given notice to the debtor and other enforcement creditors of the proposed sale to the creditor so that they may object, if they wish, by making application to the court. The objection period should be 14 days.

RECOMMENDATION 43:

SALES TO THE CREDITOR

The creditor should be able to buy the seized goods from the sheriff, but where the sale is private the sale should not be concluded unless the price bears a reasonable relationship to the market value of the property and until the debtor has been given notice of the proposed terms of the sale and has had an opportunity to object by application to the court. The objection period should be 14 days.

(4) The Buyer's Title

The *Seizures Act* provides:

> 36. On the sale by the sheriff of goods pursuant to a writ of execution or a distress, the sale shall be without warranty of title and the purchaser, on paying the purchase price, thereby acquires the precise interest and no more in the goods that are so sold and

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[128] Dunlop, *supra*, note 1 at 401.

[129] Section 60(1) of the PPSA provides that "the secured party may purchase the collateral or any part of it only at a public sale and only for a price that bears a reasonable relationship to the market value of the collateral". We think that our proposed notice requirement justifies allowing the creditor to buy at other than a public sale.

> that are lawfully sold under execution or distress, as the case may be.

Professor Dunlop notes:

> The bidder at a sheriff's sale is in a difficult position. The sheriff will generally offer no promises either as to his authority to sell or as to the title which the debtor has in the goods. The purchaser is left very much on his own, and any bid he makes involves a substantial gamble as to the validity and effectiveness of the transaction.[130]

Where the property sold by the sheriff is subject to a registered security interest, the buyer takes subject to that interest. The purchaser is in the same position as he or she would have been had the encumbered property been bought directly from the debtor; however, if the method of sale is one that makes it difficult for the purchaser to search for registered encumbrances, such as an auction, then the purchaser has no practical means of protection.

Similarly, if the property seized is not the property of the debtor at all, the buyer will acquire no title. The true owner will have the right to the return of the property. It could be that the risk on the purchaser tends to reduce the price obtainable at a sheriff's sale.[131] It is not an acceptable solution to provide that a sheriff's sale cleanses the title; this would simply substitute the innocent true owner, or the innocent security holder, for the innocent purchaser as the one to suffer in these circumstances.

It is not satisfactory to leave the law in its present state. As for registered encumbrances, we think that the sheriff should be required to search the PPR for encumbrances against the debtor (or the debtor's property if it is registered by serial number) and to inform prospective purchasers of those encumbrances at the time of sale. If he fails to do so and a purchaser is prejudiced as a result, the purchaser should claim against the assurance fund that we recommend be established in Chapter 11. We recommend further that a purchaser who suffers a loss as a result of the debtor not having had title to the property should have a right of recovery from the assurance fund. Such assurance should help to ensure that the price offered at an enforcement sale does not suffer by reason of the absence of a warranty of title.

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[130] Dunlop, *supra*, note 1 at 402.

[131] The Department of the Attorney General observed in response to our Report for Discussion, however, that, with few exceptions, market value is received for property sold by the sheriff: letter from D.W. Perras, Q.C., Deputy Attorney General of Alberta, to the Institute (November 13, 1986).

We considered the question of the priority between writs of enforcement and unregistered security interests in Chapter 2. We noted with approval that section 20(1)(a) of the PPSA provides that an unperfected security interest does not have priority over the interest of an execution creditor who has caused the property to be seized.[132] The purchaser from the sheriff will acquire the property free of the interest. The holder of the interest loses the security by failing to register. It is not unjust that no compensation is received in such circumstances.

RECOMMENDATION 44:

THE BUYER'S TITLE

The sheriff should be required to inform prospective purchasers of registered encumbrances affecting the debtor's title to the seized property at the time of sale. If he fails to do so and a purchaser is prejudiced as a result, the purchaser should be compensated from the enforcement assurance fund. A purchaser who suffers a loss as a result of the debtor not having had title to the property should also have a right to compensation from the assurance fund.

J. Other Provisions

There are several other provisions in the existing seizure procedure that we do not consider it necessary to discuss as we think that they should be continued in the reformed legislation. These include the provisions regarding the seizure of growing crops and livestock,[133] the seizure of a mobile home,[134] the disposal of perishable goods,[135] the release of seizure,[136] and offenses and penalties.[137]

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[132] See text *supra*, at note 38. It would appear that s. 36 of the *Seizures Act*, quoted above, must be read subject to s. 20(1)(a) of the PPSA. The words "precise interest and no more" in s. 36 evidently must be read as meaning "except unregistered security interests."

[133] *Seizures Act*, ss 10-13.

[134] *Ibid*. s. 24.

[135] *Ibid*. s. 31(2).

[136] *Ibid*. s. 40.

[137] *Ibid*. ss 41-44.

Similar provisions to these have been included in the draft legislation that accompanies this report.

CHAPTER 5
SPECIAL SEIZURE MECHANISMS

We intend that the procedures discussed and recommended in the preceding chapter should apply to all seizures generally; however, we recognize that the general seizure process will not operate effectively in all seizure contexts because of the peculiar characteristics of some of the specific assets against which enforcement will be sought. In this chapter, we will address the application and adaptation of the general seizure process for use in some of these specific contexts. We have chosen contexts that we think will arise frequently enough to justify special legislative treatment. Adaptations of the general seizure process for other specific assets will be accomplished through court-ordered enforcement, which we discuss in Chapter 8.

A. Enforcement Against Negotiable Instruments

(1) Scope of This Section

This section deals with enforcement against negotiable instruments. Section B deals with enforcement against securities;[138] however, some documents can be described quite properly as both "negotiable instruments" and "securities". For example, section 44(3) of the *Business Corporations Act* states expressly that a security is a negotiable instrument, unless the contrary is indicated on the security itself.

We have concluded that for the purposes of the proposed enforcement system, it is appropriate to group publicly traded debt issues (eg, bonds and debentures) with other securities. Thus, publicly traded debt obligations, as well as both publicly and non-publicly traded equity stocks, are dealt with as "securities" under Section B. Therefore, this section on negotiable instruments should be understood to be dealing only with negotiable instruments that are not publicly traded.[139]

(2) Reform Issues

A negotiable instrument is a special species of document evidencing the debt obligation of one party to another. It is special in that the obligation to pay can easily be transferred from person to person by "endorsement" and delivery of the document (where the instrument is payable to order) or by delivery of the document (where the instrument is payable to bearer). In certain circumstances, the transferee of the document, who is called a holder in due course, becomes entitled to enforce the debt obligation notwithstanding any defence that might have been raised against the party from whom it was received. The transferee is said to take the instrument free of the equities upon which the transferor held it. The law governing negotiable instruments is the federal *Bills of Exchange Act*.[140]

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[138] In Section B, we use the term "securities" to refer to certain rights and obligations, and the term "security certificates" to refer to documents that evidence such rights and obligations. For the moment, however, we will use the term "securities" to refer to both the right or obligation and the document.

[139] What counts as being "publicly traded" is discussed in Section B(2) of this chapter.

The category of negotiable instruments, which is not closed, includes bills of exchange, promissory notes and cheques, currency, bearer bonds, and some forms of corporate stock and dividend warrants. Some assets have some, but not all, of the characteristics of negotiable instruments. These include bills of lading and letters of credit. Whether other instruments are negotiable or not depends on their form, wording or other governing conditions. These include travellers' cheques, deposit receipts, postal money orders, share warrants and dividend warrants. *Falconbridge* observes:

> The law is of a progressive character. Instruments which at one time are not negotiable, may, by usage of the market, afterwards become so.[141]

The *Seizures Act* provides for execution against negotiable instruments in section 6:

> 6(1) By virtue of a writ of execution a sheriff may seize money or bank notes belonging to the debtor including
>
> (a) any surplus of a former execution against the debtor, and
>
> (b) any money levied under a writ of execution issued on a judgment or order in the debtor's favour,
>
> as well as any cheques, bills of exchange, promissory notes, bonds, mortgages or other securities for money belonging to the person against whom the execution has been issued.
>
> (2) The sheriff may hold the cheques, bills of exchange, promissory notes, bonds or other securities for money as security for the amount directed to be levied or so much thereof as has not been otherwise levied or raised, and

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[140] R.S.C. 1985, c B-4.

[141] *Falconbridge on Banking and Bills of Exchange*, 7th ed. (Toronto: Canada Law Book Ltd., 1969), at 411.

> (a) subject to the *Execution Creditors Act*, may pay and assign those securities to the creditor at the sum actually due on and secured by them respectively if the creditor will accept them as money collected, and the assignment on notice to the debtor vests in the creditor all the rights that are capable of assignment in respect of the securities, or
>
> (b) may sue in his own name for the recovery of the sums secured thereby and for the enforcement of the security.
>
> (3) The transfer by the sheriff to the creditor of any of the property mentioned in this section discharges the sheriff to the extent of the amount due on and secured thereby.
>
> (4) Payment to the sheriff by the person liable under any of the securities mentioned in this section and seized in execution by the sheriff discharges the person so liable from his liability in respect thereof to the extent of the payment.
>
> (5) Subject to the *Execution Creditors Act*, any money realized by the sheriff under a writ of execution in respect of any of the property mentioned in this section, subject to the payment of the proper costs, charges, expenses, fees and poundages of the sheriff, is payable to the person entitled thereto under the *Execution Creditors Act* to the extent to which they are so entitled, and any surplus that then remains shall be paid to the debtor or other person lawfully entitled to receive it.

We have previously considered how the changes that we have proposed on the binding effect of the writ of enforcement will affect negotiable instruments.[142] We consider it necessary now to review two other aspects of enforcement against negotiable instruments. First, whether the method of enforcement against negotiable instruments must be ordinary seizure or whether some form of enforcement by notice, akin to garnishment, will suffice. Second, the means by which the value represented by the instrument can be realized for the benefit of creditors.

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[142] See *supra*, at 50 ff.

(3) Method of Enforcement

Should enforcement against negotiable instruments be accomplished only by seizure of the instrument, or is service of some form of notice of enforcement on the party liable on the instrument an acceptable alternative?

Two qualities of negotiable instruments suggest that seizure is necessary to achieve effective control over the asset that they represent. These qualities have been described by Professor Benjamin Geva as follows:

> The first quality concerns the mode of transferring a negotiable instrument, or the mode of acquiring the rights embodied therein. It reflects the notion that a bill or note is both a chattel and a chose in action. Its ownership involves the right to possess a tangible scrap of paper side by side with the right to recover from parties liable thereon. The entitlement to the promises of these parties and the right to the chattel are inseparable. "The right to hold the paper and the right to enforce the obligation are in the same person." Discharge of the obligations on the instrument is by payment to its holder. Hence transfer of the right to sue on the instrument is to be made by physical delivery of the instrument itself.
>
> The second quality of negotiability is expressed by the holder in due course doctrine. According to this doctrine, one who takes possession of a negotiable instrument in good faith and for value, holds it free from any defect of title of prior parties. He may thus obtain a better title that his transferor.[143]

Professor Geva maintains, however, that these qualities do not necessarily restrict the choice of enforcement process to seizure. He notes that the law of negotiable instruments provides two methods of transfer: transfer by assignment, which does not involve delivery of the "scrap of paper", and transfer by negotiation, which does. An assignee's title would be defeated by a holder in due course if the debtor had negotiated the instrument. Accordingly, where the law of negotiable instruments is concerned, notice of enforcement served on the party ultimately liable under the negotiable instrument would be effective if there was no subsequent negotiation by the debtor. Professor Geva observes:

> Having accommodated the assignment of a bill or note, the law of negotiable instruments must be taken

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[143] B. Geva, "Execution Against Negotiable Instruments", in Springman and Gertner, *Debtor-Creditor Law Practice and Doctrine* (Toronto: Butterworths, 1985), 81 at 92 [footnotes omitted].

> to tolerate, on the same footing, the notice of seizure given by the sheriff. Following the notice, the sheriff may physically seize the instrument. Until then, the seizure may be defeated by the judgment debtor's negotiation of the instrument to a holder in due course. Subject to this, notice should constitute an effective execution or seizure against bills and notes.[144]

The defeasibility of the interest of a creditor to that of a holder in due course, if enforcement were accomplished by notice and not seizure, would be significant from a practical point of view. The creditor would be in jeopardy of having the process frustrated by a negotiation of the instrument by the debtor. But if the only party at risk were the creditor, the question of whether to seize or enforce by notice could be left to the creditor.

Enforcement by notice to the party primarily liable, however, would also create significant difficulties and limitations when realizing on the seized asset, passing good title to a purchaser, and protecting the party primarily liable from double liability.[145] As long as the instrument was not in the sheriff's possession, no purchaser would be willing to buy it. If the sheriff could not give the instrument up to the party primarily liable, he would not be willing to honour it.

We do not think that it would be appropriate for the legislation to attempt to remove these difficulties. To do so would damage unacceptably the usefulness of the negotiable instrument as a tool of commerce. In any case, legislative removal of these difficulties would likely be beyond the constitutional authority of the provincial legislature. Provincial legislation providing the necessary alterations to the position of the holder in due course would violate the federal legislative sphere.[146] There might well be circumstances where it is impossible or impractical to seize a negotiable instrument payable to the debtor, or where service of some form of notice of enforcement on the party principally liable would have some benefit. We believe, however, that the limits on the effectiveness of such a process render it largely impractical. Enforcement by notice should not even be provided as an alternative process. Seizure should be the only allowable method of enforcement against negotiable instruments. Where a benefit would flow from giving the party or parties liable on the instrument notice of the seizure,[147] the sheriff should be at liberty to do so, on his own initiative or if instructed by the creditor, but such notice should be neither essential to nor sufficient for effective enforcement.

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[144] *Ibid*. at 97.

[145] *Ibid*. at 121, 123.

[146] See *supra*, note 30. The New Brunswick Department of Justice, Law Reform Division suggests in its Third Report of the Consumer Protection Project, Vol. II, *Legal Remedies of the Unsecured Creditor after Judgement* (Fredericton: The Department, 1976), note 11 at 19 [hereinafter New Brunswick Remedies] that such legislation would be unconstitutional. It distinguishes between physical seizure, which would make negotiation by the debtor impossible but would not alter the negotiability of the instrument, and seizure by notice, which would interfere with the negotiability of the instrument. The former would not violate federal legislative jurisdiction, the latter would.

Accordingly, our recommendation is that the method of enforcement for negotiable instruments should be exactly the same as that for any tangible chattel. We do not intend that the removal of a seized negotiable instrument should be an essential element of seizure. Of course, failure to remove the instrument could render the seizure practically ineffective, but the only party at risk is the creditor. Obviously, the sheriff will not attempt to realize upon the instrument until it is removed from the debtor and placed in the possession of the sheriff. If the debtor negotiates the instrument in the meantime, the person to whom it is negotiated will not be affected by the seizure because of the "holder in due course doctrine" and the exception to the effect of registration of the writ in the PPR as discussed in Chapter 2.

In any case, we think that if removal is made an essential element of seizure it would place too great a burden on the sheriff. Legally effective seizure should not be dependent on the sheriff recognizing that the instrument is negotiable. This would be particularly difficult if the seizure was of a large bundle of instruments, some of which were negotiable and some of which were not. We prefer that it be left to the creditor to instruct removal if he or she wishes to eliminate the risk of negotiation by the debtor.

RECOMMENDATION 45:

NEGOTIABLE INSTRUMENTS — SEIZURE

Enforcement against a negotiable instrument held by the debtor should be accomplished by the same seizure process that applies to tangible chattels.

As in the general seizure process, removal of the instrument from the possession of the debtor should not be an essential element of a legally effective seizure, even though it might be required to render the seizure practically effective.

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[147] Geva, *supra*, note 143 at 125-26.

(4) Realization on Seized Negotiable Instruments

A person who owns a negotiable instrument has several means of realizing its value: transferring the instrument to someone willing to buy the obligation represented by the instrument, assigning the obligation, or presenting the instrument to the person liable on it and demanding payment (the owner can sue if that person fails to pay, and can sue any of the persons who endorsed the instrument after it was issued by the maker).

In each case, the person attempting to realize must have the legal capacity to do so. The *Bills of Exchange Act* and the law of negotiable instruments establish the conditions that must exist so that the person has such legal capacity. Generally, the person must be a "holder" of the instrument. In the case of a negotiable instrument payable to order, "holder" means the payee or endorsee who is in possession of the instrument.[148]

When the sheriff seizes a negotiable instrument, he does not take it by endorsement from the debtor. Accordingly, by the act of seizure, the sheriff does not become a holder. If he is to have capacity to realize on the instrument by the means that are available to the debtor, he must acquire that capacity in some other way.

Professor Geva maintains that the sheriff acquires the necessary capacity by the operation of the principles of general execution law. He refers to authorities who establish that a non-holder, that is someone who has not received the instrument by endorsement, can by operation of law obtain the rights of a holder with respect to the instrument. For example, the personal representative of a deceased holder or, before the reform of the law relating to the capacity of married women to own property, the husband of a married woman who was a holder could validly negotiate the instrument. Professor Geva concludes that the sheriff who has seized a negotiable instrument is in the same position as the owner and has the capacity to use the various means of realization that are available to a holder.[149]

Professor Geva suggests also that the purpose of section 6(2) of the *Seizures Act*, which says that the sheriff "may hold" the negotiable instruments "as security for the amount directed to be levied", is to give the sheriff a proprietary interest in the instrument that he does not receive by the act of seizure; however, if that is the intent of the section, it is far from obvious. The Ontario Commission concluded that the phrase "hold such [negotiable instruments] as security" in the Ontario equivalent of section 6(2) "is ambiguous and serves no useful purpose" and should be abandoned.[150]

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[148] *Bills of Exchange Act*, R.S.C. 1985, c. B-4, s. 1.

[149] Geva, *supra*, note 143 at 129-30.

[150] OLRC 2, *supra*, note 57 at 42.

In any case, even though the sheriff might at present have the legal capacity to realize upon seized negotiable instruments in the way a holder can, we think that it would be appropriate for the reformed legislation to provide expressly that he does have such a capacity.

It would not be appropriate, however, to provide that the sheriff be deemed a holder of the seized instrument. The sheriff should not have any greater rights than the debtor, and the equities that might be raised against the debtor should bind the sheriff also; however, the sheriff should not have lesser rights than the debtor. He should have the debtor's capacity to negotiate, present, collect and enforce the instrument. Accordingly, we propose that the sheriff be statutorily constituted the agent of the debtor with full authority to deal with the instrument in every way that the debtor could. The statute should give the sheriff such authority as he would have if the debtor had constituted the sheriff his agent.[151]

We do not think that there would be any constitutional impediment to such a provision in a provincial statute. It would be legislation aimed at the enforcement of judgments, a valid provincial subject. Although it would affect the debtor's rights with respect to negotiable instruments, it would not alter the character or restrict the negotiability of the instrument or impair the rights of holders.[152]

With this statutory authority, the sheriff would be able to present the instrument for payment, to sue on it if dishonoured, to receive payments from the party liable on the instrument that would effectively discharge that party, and to negotiate the instrument by endorsement. A party receiving the instrument by endorsement from the sheriff as agent of the debtor would become a holder in due course if he or she otherwise qualified for that status.[153]

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[151] The *Bills of Exchange Act* contemplates agents having such authority in s. 4:

> Where, by this Act, any instrument or writing is required to be signed by any person, it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person by or under his authority.

[152] There is a precedent for provincial legislation affecting the rights of a holder of a negotiable instrument for a valid provincial purpose. The *Dependent Adults Act*, s. 29(g), provides that a trustee appointed under that act can "draw, accept and endorse bills of exchange and promissory notes, endorse bonds, debentures, coupons and other negotiable instruments and securities . . .".

[153] Geva, *supra*, note 143 at 128-34 considers whether or not the purchaser's knowledge that he or she was taking from the sheriff and would impair

(continued...)

The Ontario Commission described the procedure used by sheriffs in Ontario for collecting on cheques payable to the order of the debtor as follows:

> Where . . . the sheriff seizes a cheque, the present practice would appear to be to stamp on the back of the cheque that it has been seized, and then to take it, along with a copy of the writ of *fieri facias* under which it was seized, to the sheriff's bank. The bank will cash the cheque and the sheriff will then deposit the money, up to the amount required to be levied, in his trust account for subsequent distribution to the creditors.[154]

We are advised that a similar procedure is followed by the Edmonton sheriff.

The Ontario Commission considered this practice "questionable as a matter of law" but practically effective, and recommended that it be continued with the support of statutory provision entitling the sheriff "to demand and receive directly from the . . . bank, drawee, or person liable the amount secured by the instrument."[155] We think that our proposal to constitute the sheriff agent of the debtor by statute would serve the same purpose and remove any question as to the validity of the sheriff's dealing with instruments such as cheques in the manner described by the Ontario Commission.

Section 6(2) of the *Seizures Act* contemplates the sheriff "paying or assigning" seized negotiable instruments to the creditor "subject to the *Execution Creditor's Act*". The section does not indicate, however, what credit is to be applied to the execution debt as a result of the transfer of the seized instrument to the creditor. Should it be the face value or some discounted value? The section does not indicate that the direct transfer is to be co-ordinated with the sharing principle governing distributions either, but it does recognize that co-ordination is necessary.

We previously recommended that the creditor should be able to buy seized property from the sheriff subject to certain safeguards.[156] If the negotiable instrument was sold to the creditor in the manner contemplated by that recommendation, there would be no problem as to the credit to be given the debtor against the judgment debt or as to sharing of the realized value among enforcement creditors. We think that the direct transfer procedure provided in

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[153](...continued)
his or her ability through the enforcement process to be a holder in due course and concludes that it would not.

[154] OLRC Part 2, *supra*, note 57 at 50.

[155] *Ibid*.

[156] Recommendation 43, *supra*, at 108.

section 6(2) should be abolished in favour of this "sale to creditor" procedure, which is part of the ordinary seizure process.

RECOMMENDATION 46:

REALIZATION ON NEGOTIABLE INSTRUMENTS

The statute should provide that the sheriff is the agent of the debtor with authority to deal with seized negotiable instruments as fully as would be the case if the debtor had granted such authority.

The present provision that contemplates the sheriff paying or assigning a seized instrument to the creditor should be abolished in favour of the "sale to creditor", which is part of the recommended general seizure procedure.

B. Enforcement Against Securities

(1) Subject Matter

The heading of this section indicates that we are concerned with "securities". As used in everyday commercial and legal discourse, this term can denote a broad and shifting range of interests and obligations, as well as the documents that evidence such interests and obligations.[157] In the present context, we will use the term "securities" when referring to the following:

(a) non-publicly traded shares issued by corporations;

(b) publicly traded interests (including shares) and debt obligations of corporations and other entities; and

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[157] The diversity of usage of the term "security" is well illustrated by a glance at three Alberta statutes, the *Business Corporations Act*, the PPSA and the *Securities Act*. The *Business Corporations Act* has different definitions of "security" in ss 1 and 44(2), the latter applying to Part 6 and the former applying elsewhere. The PPSA's definition of "security" in s. 1(1) is similar, but not identical, to the definition in s. 44(2) of the *Business Corporations Act*. The definition of "security" in s. 1 of the *Securities Act* is different, and much broader, than the definitions in the other two acts.

(c) publicly traded rights to acquire or sell interests or obligations referred to in (b).

Under heading (2) below, we elaborate on the term "publicly traded", as used above. Before getting to that, however, we need to clarify certain other elements of the foregoing definition.

The first point is that we refer to interests and obligations having certain characteristics, not to documents having certain characteristics. Unlike some definitions of "securities", our definition is not document oriented. We will refer to documents that evidence or represent securities as "security certificates". One of the points we will emphasize below is that it is becoming increasingly common for securities, especially publicly traded securities, not to be evidenced by securities certificates.

It will be noted that our definition treats shares in corporations as securities, whether they are publicly traded or not; however, debt obligations and other interests are treated as securities only if they are publicly traded.[158]

Our definition of "securities" refers to publicly traded interests in and obligations of corporations and certain other entities. So far as obligations are concerned, the entities we have in mind are entities that can incur debt obligations. This would include, for instance, a government or a partnership. As far as interests in "entities" are concerned, what we have in mind are things that may not always be treated as legal persons, but are nevertheless regarded for some purposes as distinct entities in which there can be publicly traded ownership interests. Examples of such entities are limited partnerships and trusts. We treat publicly traded interests (whether described as "units", "shares" or something else) in such entities as securities.

(2) Publicly and Non-publicly Traded Securities

The preceding discussion of terminology makes it obvious that we attach considerable importance to the idea of a publicly traded security. In the next few paragraphs, we explain what we mean by "publicly traded", and why we think that the question of whether or not a certain share, interest or obligation is publicly traded is important in the design of enforcement procedures.

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[158] The mechanics of realizing non-publicly traded obligations owned by an enforcement debtor are dealt with elsewhere in this and other chapters. Non-publicly traded obligations evidenced by negotiable instruments will be susceptible to seizure and realization in the manner described in section A of this chapter. Other obligations that do not fall under the securities category might be secured obligations that could be seized and realized in accordance with the procedure set out in Section C, *infra*. Others will be susceptible to garnishment, as described in Chapter 7.

The enforcement process for any type of asset must be designed with two sometimes competing objectives in mind. On the one hand, the process should be reasonably expeditious; on the other, the process must be designed to ensure that, as far as is possible, the price for which the sheriff eventually sells the seized asset bears a reasonably close relationship to its fair value. Obviously, the nature of the asset will have a great deal to do with determining the sort of enforcement procedure that will meet these objectives.

For some kinds of assets, and in some circumstances, the most difficult part of the enforcement process might be liquidating the asset for a price that bears a reasonable relationship to its value. In the first place, it might be extremely difficult to determine what the fair value of the asset in question is. An equally or even more difficult problem might be to find someone who is willing and able to pay a price approximating that value. In the case of securities,[159] these two problems will be reduced considerably, if not eliminated, if there is some sort of established market for the security in question.

By an "established market", we mean a system that facilitates transactions involving securities by providing a mechanism for bringing together people who wish to acquire such securities and people who wish to dispose of them. One necessary component of such a market is a mechanism for disseminating pricing information about the securities to participants in the market. Of course, the paradigm of an established securities market is a securities exchange, with its physical trading floor, members, rules, listing requirements, and so forth. We would regard securities that are listed on a securities exchange as publicly traded securities.

We would not restrict the category of publicly traded securities, however, to securities that trade on traditional securities exchanges. To do so would be to exclude many securities—including almost all debt securities and mutual fund shares—that are traded[160] on what is called the "over-the-counter market". There are different over-the-counter markets (none of which employ counters) for different kinds of securities. One shared characteristic is that buyers and sellers are brought together by electronic means, rather than on the floor of a securities exchange.[161] But for our purposes, the important feature of all over-the-counter markets is that they serve the two important and interdependent functions that we mentioned earlier. They provide a mechanism for bringing together buyers and sellers of securities, and they provide a mechanism for disseminating pricing information to market participants.

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[159] Actually, this applies to any asset, not just securities, but we are concerned with securities at the moment.

[160] Open-ended mutual fund shares (by far the most common kind of mutual fund) are not "traded" in the sense of being bought and sold on a secondary market; however, a mutual fund must always stand ready to repurchase its shares (or units) at a price determined by the net asset value of the underlying portfolio of securities that represent the fund's assets.

[161] Traditionally, participants in the over-the-counter market have been linked by telephone. Not surprisingly, computer networks are playing an ever-increasing role in over-the-counter markets.

It is tempting to define a publicly traded security as a security that is either listed on a stock exchange or traded on the over-the-counter securities market. We think, however, that the latter part of such a definition would be a little too open-ended for our purposes. What we need is a simple, objective means of identifying publicly traded securities. Therefore, we will treat any security that meets either of the following two criteria as a publicly traded security:

1. the security is listed on a stock exchange; or
2. values or prices for the security routinely appear in published securities market reports or in quotation services used by securities dealers.[162]

The second criterion fastens upon the "price dissemination" function of an established market. That pricing information about a security is disseminated in this manner is a fairly reliable indication that there is also a mechanism for bringing buyers and sellers of that security together.

Where there is an established market for a security that is the subject of enforcement proceedings, the burden on the sheriff is likely to be lightened on two accounts. First, the availability of pricing data reduces the problem of determining a fair value for the security.[163] Second, the existence of a mechanism for bringing buyers and sellers together provides a convenient method for liquidating the security. These two facts can and should be reflected in a somewhat different, more streamlined, procedure for liquidating publicly traded securities as compared to the procedure for liquidating securities that are not so traded.[164]

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[162] The financial pages of daily newspapers are an obvious source of published securities market reports. In addition to prices of "listed" stocks, a major newspaper's financial section will contain price quotations for a wide variety of unlisted securities that are traded on an over-the-counter basis. Quotations for many securities that do not appear regularly in publications readily available to the general public appear on quotation sheets or electronic information services that are available by subscription to members of the securities industry.

[163] It will be noted that we say "reduces", rather than "eliminates", the problem. That a security is publicly traded is no guarantee that it will have a high liquidity at any given time, or that the quoted prices will accurately reflect the underlying value of the security. But, at the very least, the quoted prices, whether they are based on actual trades or simply on "bid-and-asked" quotations, will provide the sheriff with a useful starting point.

RECOMMENDATION 47:

DEFINITIONS RELATING TO SEIZURE OF SECURITIES

The proposed enforcement system should make special provision for seizure of securities, defined as including:

(a) non-publicly traded shares in corporations;

(b) publicly traded interests in and obligations of corporations and other entities, such as governments, limited partnerships and trusts; and

(c) publicly traded rights to acquire or sell interests or obligations referred to in (b).

For certain purposes, a distinction should be drawn between publicly traded securities and non-publicly traded securities. The latter category would consist only of non-publicly traded shares.

A security would be considered to be publicly traded if it met either of the following two criteria:

(a) the security is listed on a securities exchange; or

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[164] That the sheriff is dealing with a publicly traded security does not necessarily mean that the sale process will be free of obstacles. Listing on a securities exchange is no guarantee of liquidity. Many different circumstances can impair the liquidity of an enforcement debtor's publicly traded securities. For example, the securities might be thinly traded, or the enforcement debtor might hold a larger block than the market can comfortably absorb all at once. Such circumstances can make the sheriff's task in liquidating such securities more complex than might have been hoped. In particularly complex situations, the sheriff might consider it prudent to seek directions from the court.

(b) prices or values for the security routinely appear in published securities market reports or in quotation services used by securities dealers.

(3) Effecting Seizure

(a) The existing law in modern conditions

Existing Canadian legislation contemplates two very different methods of seizing shares: 1) notice to the issuing corporation, or 2) seizure of the share certificate(s) evidencing the shares. Ontario's *Execution Act*,[165] which is widely copied in the legislation of other provinces, provides an example of the "notice to the issuer" approach. It provides, in effect, that seizure of shares is effected when the sheriff serves a copy of the writ with an appropriate notice on the shares' issuer.

Alberta's legislation takes the second approach to seizure, or, more precisely, combines the two approaches. Section 7(2) of the *Seizures Act* requires the sheriff to "seize the share certificates or other documents evidencing ownership of the shares" and "either before or within 5 days after the seizure, serve a copy of the writ" on the issuer. For good measure, section 70 of the *Business Corporations Act* provides that "[n]o seizure of a security of a distributing corporation or other interest evidenced by a security is effective until the person making the seizure obtains possession of the security."[166]

Compared to the Alberta approach, Ontario's has one major advantage, and one major disadvantage. The advantage is that seizing a share by serving notice on the issuer is likely to be much more practicable than seizing a mobile and often highly elusive share certificate. The disadvantage lies in the fact that under the Ontario act (as under Alberta's) seizure of the share has the stated effect of invalidating any subsequent transfer of the share by the debtor. After seizure, "no transfer of the shares by the execution debtor is valid unless and until the seizure has been discharged."[167] This is all well and good, as far as execution creditors are concerned, but it ignores that the debtor is left in possession of a share certificate that might well be a negotiable instrument. Making any post-seizure transfer of the security by the debtor invalid, especially a transfer to a purchaser for value without notice, seems to fly in the face of the doctrine of negotiability. Indeed, this part of section 14(2) seems to contradict section 69(2) of Ontario's *Business Corporation's Act*,[168] which provides that a *bona fide* purchaser[169] of a security "acquires the security free of any adverse claim."

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[165] R.S.O. 1980, c. 146, s. 14(2).

[166] As far as proceedings under a writ of execution are concerned (as opposed to a distress seizure), s. 70 of the *Business Corporations Act* is probably redundant to s. 7(2) of the *Seizures Act*. It might be argued, however, that the latter would permit the certificate to be left on a bailee's undertaking, whereas the former would not.

[167] *Execution Act*, s. 14(2).

Whatever their comparative advantages and disadvantages, the Ontario and Alberta approaches share one serious drawback as far as publicly traded securities are concerned: neither is attuned to the realities of modern securities markets. The following paragraphs explain why this is so.

In mandating seizure of a debtor's share by serving notice on the corporation that issued the share, section 14(2) of the Ontario *Execution Act* seems to assume that the corporation's securities register will show the debtor as the registered holder of the share. On the other hand, in requiring seizure of a debtor's share to be effected by seizing the share certificate evidencing the share, the Alberta acts[170] assume that the sheriff will be able to lay hands on a specific share certificate that can be said to represent the debtor's share. Unfortunately, as far as publicly traded securities are concerned, both assumptions are likely to be wrong.

Suppose that an enforcement debtor, Jane Debtor, owns 1000 common shares of XYZ Ltd., a corporation whose common shares trade on a major stock exchange. It is possible that the share register of XYZ Ltd. shows Jane Debtor as the registered holder of 1000 common shares. It is also possible that there is a share certificate with Jane's name on it that is either in Jane's possession or kept in safekeeping for her by a stockbroker, bank or similar custodian. But this is not the most likely manner for Jane's shares to be held, especially if Jane is an active investor who regularly buys and sells securities. The reality of modern securities markets is that some variation on either of the following two scenarios—especially the second—is likely to give a better picture of the true situation.

Scenario 1: certificate system

Jane Debtor owns 1000 shares in XYZ Ltd., but her name does not show up in the latter's share register. Many thousands of XYZ shares are registered in the name of Jane's stockbroker ("Broker"), who holds the shares for its various customers. XYZ Ltd. probably has no knowledge of Jane's existence, but Broker's records show that 1000 of the XYZ shares registered in Broker's name are held for Jane's account. It is possible, but unlikely, that Broker has somehow earmarked share certificates representing 1000 shares as the share certificates that belong to Jane. It is more likely that Jane's shares are not represented by any particular certificate(s). Instead, Broker has a stack of security certificates representing all the shares of XYZ held by Broker for its customers. These certificates are segregated from Broker's own holdings of XYZ shares, but they are not identified by customer. Rather, Jane has, in picturesque legal terminology, a proportionate interest in the fungible mass of XYZ share certificates.

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[168] S.O. 1982, c. 4.

[169] As under our own act, "*bona fide* purchaser" incorporates the requirements of 1) purchase for value, 2) delivery of the security to the purchaser, and 3) lack of knowledge of any adverse claim against the security.

[170] *Seizures Act*, s. 7(2), and *Business Corporations Act*, s. 70.

The main reason for having Jane's shares registered in the name of Broker, and for the share certificates representing different customers' securities being treated as interchangeable, is to facilitate trading in the shares. The mechanics of clearing trades and registering transfers are simpler if brokers have an inventory of certificates issued in their own names (or perhaps in the name of a nominee), any of which can be delivered to other brokers or a clearing agency to complete trades.

Scenario 2: book-based system

No matter how much the handling of paper securities certificates is streamlined, a securities market that relies on the delivery of such certificates to settle trades is probably going to choke on all this paper when trading volumes reach a critical level. Trading volumes in major securities markets reached this critical level long ago, and the securities industry was forced to look for a method of settling securities trades that did not require the constant shuffling back and forth of mountains of security certificates. The result has been the introduction and rapid expansion of "book-based" settlement systems, which rely heavily on computer record keeping. We describe the general principles of such a system below, insofar as they are relevant to our topic.

A book-based system of clearing trades in securities requires an entity commonly referred to as a "depository". The depository functions as a clearing agency for trades in securities in the market or markets for which it is organized. The system is premised on the depository[171] being the registered owner of a large proportion (ideally, it would be all) of the securities traded in the relevant market. The depository holds these securities on account of its members: securities dealers, financial institutions and certain other institutional investors. The shifting position of each member in various securities is recorded in the depository's ledgers.

Insofar as Jane Debtor and her 1000 shares in XYZ Ltd. are concerned, the book-based system works something like this. As in the certificate system, XYZ's share register contains no indication that Jane is a shareholder. Indeed, the share register does not even show Broker as a shareholder. Instead, it shows that a substantial proportion of XYZ's shares, say 700,000 shares, is held by the depository ("Depository"). Depository's records do not show that any of the XYZ shares issued in its name are held for Jane. What they do show is that it holds, let us say, 25,000 shares in XYZ Ltd. for Broker.

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[171] In fact, the securities are more likely to be registered in the name of a nominee of the depository than in the name of the depository itself. But for our purposes, we can assume that the depository and its nominee are one and the same entity.

It is only when we reach Broker's records that we find any indication of Jane's position in XYZ shares. These records show that 1000 of the XYZ shares held by Depository for Broker are in turn held by Broker for Jane. If Jane were to instruct Broker to sell these shares, the sale would ultimately be consummated by an appropriate entry in the ledgers of the depository, debiting Broker's account for 1000 shares and crediting the purchasing broker's account for 1000 shares.[172] XYZ's share register would be entirely unaffected by these goings-on.

A moment's consideration will reveal the impracticability of effecting seizure of Jane's XYZ shares in either of the preceding scenarios by serving a notice of seizure on XYZ Ltd. (ie, the Ontario approach). As far as XYZ Ltd.'s share register is concerned, Jane does not even exist. Serving notice of seizure on XYZ Ltd. would be a futile exercise.

The Alberta approach of requiring seizure of the share certificates that represent Jane's shares is not any more realistic. The problem is not simply that Jane's share certificate is held by a third person. Seizing tangible property of an enforcement debtor that is in the hands of a third person is not in itself a matter of great difficulty. The problem is that, at best, there will only be a tenuous relationship between Jane's shareholding in XYZ and any physical share certificate. In Scenario 2, there is not even a tenuous relationship, because there are no share certificates evidencing Jane's shares. The only evidence of Jane's shareholdings are the entries in Broker's ledgers; thus, the idea of seizing share certificates evidencing Jane's shares is unrealistic.

In Scenario 1, it is arguable that the sheriff could seize Jane's shares by seizing any certificates that represent 1000 shares from among the bulk of share certificates held by Broker for its various customers. The certificates are, after all, fungible. It should not matter, one would think, that none of the certificates are specifically allocated by Broker to Jane; however, the point of such an exercise is difficult to see. Clearly, Jane cannot sell her shares, except through Broker, since Broker has the certificates. Therefore, the most practical method of seizure would seem to be to notify Broker that Jane's shares are under seizure and that Broker must henceforth act on instructions from the sheriff, and not Jane, regarding any disposition of the seized shares. After all, when the time comes for the sheriff to sell the shares, the certificates will have to be put in the hands of a broker to effect the sale. It will save unnecessary paper shuffling to leave the certificates with Broker from the outset, and then have Broker sell the shares on behalf of the sheriff.

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[172] This is an oversimplification of the mechanics. If the clearing system is based on some sort of "trade netting" arrangement, which is likely, there probably will not be a specific entry in the depository's ledgers that directly corresponds to the sale of Jane's 1000 shares. On any given day, Broker could be involved in many different transactions involving XYZ shares—both as buyer and seller—with a variety of other brokers or financial institutions. If the net result of all Broker's trades in XYZ shares that are to settle on the settlement day for Jane's transaction is that Broker is owed 500 shares, then the depository will credit 500 shares to Broker's ledger position in XYZ shares. There will be no specific debit entry to reflect the sale of Jane's 1000 shares.

(b) Proposals for effecting seizure of securities

(i) Publicly traded securities

The preceding discussion indicates that the two standard alternatives for seizing shares—notice to the issuer or seizure of the share certificate(s) representing the shares—are likely to be futile for many if not most publicly traded securities. But it also indicates an expeditious and effective method of seizing such securities. In both scenarios, the key actor is the broker. Apart from Jane herself, Broker is the only actor who has a record of Jane's ownership of shares in XYZ Ltd. It is through Broker that dividends and information to shareholders must flow to Jane, and it is only through Broker that a disposition of Jane's shares can be effected. Therefore, it makes sense for Broker to be the focus of efforts to seize Jane's shares. More particularly, seizure can be most effectively and efficiently accomplished by serving an appropriate form of notice on the broker (or other intermediary) whose records indicate an enforcement debtor's ownership of the shares in question.

Both the Ontario Law Reform Commission[173] and the British Columbia Law Reform Commission[174] have recognized the need to deal with the reality of the manner in which publicly traded securities are held and dealt with in today's securities markets. We take the same basic approach as those two agencies to the question of how to effect seizure of such securities; however, there are some differences between their respective approaches and our approach, which we will mention later.

Although we have emphasized that seizure of publicly traded securities by one of the traditional share seizure methods is likely to be impossible or impractical in many cases, there will certainly be those where one or the other of these methods is the most appropriate method of effecting seizure. Therefore, we think that the sheriff should be able to choose between three methods of effecting seizure of publicly traded securities.[175]

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[173] OLRC Part 2, *supra*, note 57, at 66-7.

[174] LRCBC Shares, *supra*, note 103, at 46-8. The working paper "does not represent the final views of the Commission."

[175] In describing the three methods of effecting seizure, we do not say anything about serving the seizure documents on the debtor; however, the general seizure process described in Chapter 4 includes the (continued...)

The first option would be to seize the security certificate evidencing the security, if there is such a certificate. This would undoubtedly be the method of choice where the enforcement debtor is in possession of the relevant certificate, as it will ensure that the debtor does not dispose of the certificate. For the reasons already mentioned, seizing the security certificate would likely be a less attractive option if the certificate is in the hands of a third party, such as a broker, and would obviously be out of the question where there is no certificate that evidences the debtor's security.

The second option for effecting seizure would be to give notice of seizure to the issuer, if the debtor is shown as the registered holder of the security. This would have various consequences, which will be described as we go along.

The third option for effecting seizure is intended to deal with the situation where the debtor's ownership of the securities is not reflected in the records of the issuer or by any security certificate in the debtor's possession but is evidenced by an entry in the records of a third party, such as a broker. Here, the sheriff should be able to effect seizure by serving an appropriately worded notice of seizure on the third party. The third party would then become a custodian of the securities for the sheriff and would be liable to enforcement creditors if it dealt with the securities otherwise than in accordance with the directions of the sheriff.[176]

We emphasize that these alternative methods of seizure really are intended to be options. Subject to the constraint mentioned in the next paragraph but one, a sheriff should be able to use whichever method of seizure seems most appropriate in the circumstances. In particular, we would not adopt the following limitation proposed by both the Ontario and British Columbia commissions. The Ontario Commission proposed that "in order to effect a seizure of shares in the debtor's possession . . . the sheriff should be required to seize physically either the share certificates or other documents of a similar nature."[177] Under the British Columbia Commission's (tentative) proposal, unless the certificate

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[175](...continued)
requirement that the enforcement debtor be served with the seizure documents either at the time seizure is effected or as soon after as is possible: see Recommendation 32, *supra*, at 85. Until the seizure documents are served on the enforcement debtor, the notice of objection period does not run. For all three methods, serving the seizure documents on the debtor will be necessary to allow the securities to be sold.

[176] It would not be unusual for the third party who has control over the securities to have a lien on them. The third party's lien claim would not be affected by the seizure. Moreover, a broker who sold the security on the instructions of the sheriff would be entitled to the normal commission for such services.

[177] OLRC Part 2, *supra*, note 57 at 66.

representing an "unrestricted" share was in the possession of a bailee, the sheriff would have to get possession of the certificate to seize the share.[178]

If we were to follow the Ontario and British Columbia Law Reform commissions, seizure of a publicly traded security represented by a certificate in the possession of the enforcement debtor could be effected only by taking possession of the certificate. The avowed purpose of such a requirement is to protect third parties who might deal with the debtor in ignorance of the seizure. It is a necessary requirement if one assumes that seizure has the effect of invalidating any subsequent transfer that does not have the approval of the sheriff; however, as is explained more fully under the next heading, we would not give seizure any such effect. Under our proposals, a purchaser for value from the debtor who takes possession of the relevant certificates without notice of the seizure will be fully protected.[179]

The only formal restriction that we would impose on the sheriff's choice of the method of seizure is this. For seizure to be effected by either of the "notice" methods (notice to the issuer or notice to a third party who holds the security for the enforcement debtor), there should be a reasonable connection between the relevant person and Alberta. The relevant person is the person upon whom the notice would be served. The requirement is simply this: it must be possible to serve the notice of seizure on the issuer or third party in Alberta. This requirement is intended to ensure that the Alberta courts will have a firm basis for asserting personal jurisdiction over the relevant person—the issuer or third person who holds the security for the debtor.

The preceding paragraph raises the issue of whether securities issued by Alberta issuers should be treated differently than securities issued by "foreign" issuers, insofar as the mechanics of seizure are concerned. As a general proposition, we think that they should not. To draw a distinction on the basis of the place of incorporation or residence of the issuer would in many cases be to pay homage to an irrelevancy.

Consider our earlier example where Jane Debtor is the beneficial owner of XYZ Ltd. shares, but the registered owner of the shares is the nominee of a depository. The depository's records show that it holds a certain number of shares for a certain broker, whose records in turn indicate Jane's interest in the shares. A sale of Jane's shares would be effected by appropriate entries in the records of her broker and the depository, and would have no effect on XYZ's share register. In such circumstances, Jane's relationship to the issuer, XYZ, is so remote that it is difficult to see the relevance of an enquiry into where XYZ Ltd. is incorporated. Of much more practical relevance is the question of whether or not the courts of Alberta have power over Jane's broker, so that serving a notice of seizure on the broker would be an effective means of taking control over the securities.

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[178] LRCBC Shares, *supra*, note 103 at 46-8. In the British Columbia proposals, an unrestricted share is a share that is not subject to a transfer limitation imposed by the issuer's incorporating documents.

[179] Obviously, effecting seizure of securities by giving notice to the issuer will not be the ideal method of seizure where the enforcement debtor has possession of security certificates evidencing the security. The seizure will be defeated if the certificates get into the hands of a *bona fide* purchaser; so it will be safer for the sheriff to take possession of the certificates. There might be circumstances, however, where it is more practicable for seizure to be effected by notice to the corporation, at least as an interim measure, than by seizing the security certificates in the debtor's possession.

We do not contend that awkward situations will never arise; they will because of differences between the laws of Alberta and the laws of the home jurisdiction of an issuer of securities seized in Alberta. This possibility can be dealt with by giving the court the power to make any order necessary to spare an issuer, or any other affected person, from being prejudiced by a conflict between the Alberta laws pertaining to seizure of securities and the laws of the issuer's home jurisdiction. The court would have to be shown, however, that there would likely be actual prejudice, and not just a theoretical conflict or inconsistency between the laws of Alberta and the laws of the issuer's home jurisdiction.

(ii) Non-publicly traded shares

Effecting seizure of non-publicly traded shares is actually likely to be less troublesome than is effecting seizure of publicly traded securities. The very fact that non-publicly traded shares are not traded publicly makes it more likely that the beneficial owner of such shares will be the registered holder, because the main purpose of registration in the name of a depository or stockbroker is to facilitate trading. Thus, if an enforcement debtor is the beneficial owner of a non-publicly traded share, he or she is likely to be its registered holder as well. This means that in most cases it should be possible to seize a non-publicly traded share by serving a notice of seizure on the issuing corporation.

Where a notice of seizure has been served on the issuer of non-publicly traded shares, the issuer should be required to indicate this to anyone who enquires regarding the enforcement debtor's ownership of or ability to transfer those shares. This would increase the likelihood that potential purchasers of the seized shares will learn of the seizure. The importance of this is discussed in the next section: "Effect of seizure on subsequent transferees".

Although seizure by notice to the issuing corporation would be the norm for non-publicly traded shares, there might be circumstances in which it would be more appropriate to seize a non-publicly traded share by seizing the share certificate, or even by serving a notice of seizure on a third party who has possession of the share certificate or in whose name the share is registered.[180] In other words, all three methods of seizure contemplated for publicly traded securities would also be available for non-publicly traded shares. Again, it would be up to the sheriff, taking into account the wishes of the instructing creditor, to decide how to proceed in any given situation.

RECOMMENDATION 48:

SEIZURE OF SECURITIES

Seizure of securities owned by an enforcement debtor should be accomplished by one of the following methods:

(a) seizure of the security certificates that represent the securities;

(b) service of an appropriately worded notice of seizure on the issuer of the securities where the enforcement debtor is the registered holder of the securities; and

(c) service of an appropriately worded notice of seizure on a broker or other third party who holds the securities for the enforcement debtor.

The method of seizure actually used should be at the discretion of the sheriff, except that seizure by method (b) or method (c) should be permissible only where the notice of seizure can be served on the relevant person (issuer or third party) in Alberta.

The mechanics of seizure should not depend on the place of incorporation or the residence of the issuer; however, where a security issued by a "foreign" issuer is seized, the court should be able to make any order it considers necessary to prevent the issuer, or any other person, from being prejudiced as a result of a conflict

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[180] For example, a trustee. In such a case, the role of the trustee in the seizure process would be much like that of the broker, as described in connection with the seizure of publicly traded securities not registered in the debtor's name.

between the Alberta laws and the laws of the issuer's home jurisdiction.

Where a notice of seizure is served on the issuer of certain non-publicly traded shares, the issuer should be obliged to indicate this to any third party who makes enquiries regarding the enforcement debtor's ownership of an ability to transfer the shares.

Where seizure is effected by serving a notice of seizure on a third party, the third party should be obliged to hold and deal with the security in accordance with the directions of the sheriff, and should be liable to enforcement creditors for failing to do so.

(c) Effect of seizure on subsequent transferees

In Section (b) we said that it was unnecessary to restrict the sheriff's options for seizing securities to prevent prejudice to subsequent purchasers. To explain this statement, it is necessary to back up and consider the situation where the securities in question have not been seized but are bound by a writ.

In Chapter 2, we proposed that, once a writ is registered in the PPR, it should bind all the enforcement debtor's personal property. This would include any securities owned by the debtor. In Chapter 2, we also recognized that, as far as third persons who acquire an interest in property bound by a writ are concerned, the writ should be treated much like a security interest in the property in question. Thus, if a purchaser has acquired property bound by a writ in circumstances such that he would have had priority over a security interest perfected by registration under the PPSA, he should also have priority over the writ.

In discussing priority rules in Chapter 2, we did not specifically discuss the kind of property that the PPSA calls "securities". This term is defined in section 1(1)(oo) of the PPSA as:

> a writing that is
>
> (i) in bearer, order or registered form,
>
> (ii) of a kind commonly dealt in on securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment,
>
> (iii) one of a class or series or by its terms divisible into a class or series, and

(iv) evidence of a share, participation or other interest in or obligation of the issuer of the writing.

This definition contains no requirement that the writing in question be regarded as negotiable—a share certificate that is endorsed with a transfer restriction would meet the definition. Also, this definition is document oriented; it defines a security as a writing, rather than as the interest or obligation represented by the writing. So as to avoid confusion with our use of the term "securities" to refer to interests and obligations, we will use the term "security certificate" where the PPSA uses the term "security".

Where a security interest in a security certificate has been perfected by registration, section 31(3) of the PPSA puts the security interest in the same defeasible position as a security interest in an instrument:

> (3) A purchaser of an instrument or a security [certificate] has priority over a security interest . . . perfected [by registration] . . . if the purchaser
>
> (a) gave value for the instrument or security [certificate],
>
> (b) acquired the instrument or security [certificate] without knowledge that it was subject to a security interest, and
>
> (c) took possession of the instrument or security [certificate].

Therefore, applying our principle that writs should be treated the same as security interests, if a security certificate that is bound by a writ gets into the hands of a purchaser for value without knowledge of the writ, the purchaser should have priority over the writ. Since the PPSA draws no distinction in this respect between negotiable and non-negotiable security certificates, we would draw no distinction between publicly and non-publicly traded securities.

Similarly, we do not think that the protection afforded the purchaser should cease just because the relevant security has been seized. The protection given the purchaser for value without notice should continue, notwithstanding seizure of the security. That is, even if the security has been seized, a subsequent purchaser for value without knowledge who gets possession of the security certificate should have priority over the writ, notwithstanding the seizure.

This is not to say that seizure should or would have no practical consequences as far as subsequent purchasers (or potential purchasers) are concerned. One obvious practical consequence of seizure is that if the sheriff actually takes possession of the relevant share certificates, they cannot afterwards find their way into the hands of a purchaser for value from the debtor.[181]

A second possible practical consequence of seizure has to do with the purchaser's state of knowledge at the time of the transaction. A purchaser who knows at the time of the purchase that the securities are under seizure should be in the same position as a purchaser who knows that the securities are subject to a writ. That is, the purchaser's interest in the securities should be subordinate to the writ if he purchases with knowledge of the seizure.[182]

It is unlikely that the buyer of a publicly traded security who gets possession of the relevant security certificates will know that the security has been seized, if that is in fact the case. On the other hand, a potential purchaser of non-publicly traded shares is quite likely to get advance notice that the shares have been seized. It will be recalled from the previous section, "Proposals for effecting seizure of securities", that an issuer of non-publicly traded shares who has been served with a notice of seizure must disclose that fact to anyone who enquires regarding the debtor's ownership of or ability to transfer the shares. This makes it unlikely that any person will purchase the enforcement debtor's share without learning of the seizure, because the purchase of non-publicly traded shares does not usually take place without preliminary discussions between the prospective purchaser and the corporation:

> . . . usually the transfer of private company shares involves tripartite negotiations between the prospective purchaser of the shares, the shareholder who is selling and the other "owners" of the company (if any) to settle what will be the transferee's *de facto* relationship to the company and whether or not the transferee is a person to whom the transfer would be approved. This kind of process would usually unearth an outstanding execution.[183]

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[181] It should not be overlooked that where the securities in question have been seized by service of a notice of seizure on a third party (such as a broker) who is able to control the disposition of the shares, the third party would be personally liable if he or she were to dispose of the shares otherwise than in accordance with the sheriff's direction. This provides substantial protection for enforcement creditors; however, this protection is achieved without any adverse effect on the title of a purchaser from the broker.

[182] Another way of putting it would be that someone who knows that certain property has been seized under a writ must in fact know that the property is subject to a writ.

[183] LRCBC Shares, *supra,* note 103 at 27.

There is one respect in which we would go further than section 31(3) of the PPSA in protecting the *bona fide* purchaser of securities. To get protection against a security interest perfected by registration under the PPSA, a purchaser must take possession of the relevant security certificate; however, and as we took pains to point out in discussing the deficiencies of existing mechanisms for seizing shares, physical securities certificates are playing a steadily diminishing role in modern securities markets. It is now standard procedure for "negotiable" securities to be traded on securities markets without any security certificates changing hands. Instead, trades are settled through appropriate entries in the ledgers of a clearing agency (or "depository"). In such a context, the PPSA's emphasis on the purchaser getting possession of a security certificate seems too restrictive. It is more appropriate to concentrate on the functional equivalent in such settlement systems of a purchaser taking possession of a security certificate. We propose that the point of settlement, as determined by the rules of the relevant market, be taken as the critical point for determining the rights of the purchaser. Thus, where a purchaser for value acquires a publicly traded security in a transaction that is settled through a clearing agency, and the purchaser does not have knowledge at the time of settlement that the security is bound by a writ or has been seized under a writ, the purchaser should have priority over the writ.

RECOMMENDATION 49:

EFFECT OF SEIZURE ON SUBSEQUENT TRANSFEREES

Regardless of whether a security that is bound by a writ has been seized or not, a purchaser for value who takes possession of the security certificate evidencing the security without knowledge of the seizure or knowledge of the writ, should have priority over the writ.

A person who purchases a publicly traded security in a transaction that is settled through a clearing agency should have priority over a writ that binds the security, as long as at the time of settlement of the transaction the purchaser did not have knowledge that the security was bound by the writ or was under seizure.

(4) Dividends and Other Payments

If for no other reason than the necessity of waiting for the notice of objection period to expire, there will be an interval between seizure and realization of securities by the sheriff. It is quite likely that there might be even longer delays, especially where non-publicly traded shares are involved, than those required for the notice of objection period to expire. It is quite possible that, because of the delay between seizure and sale, dividends, interest or other payments will become payable during the interval between seizure and disposition of the security.

Under the present law, any dividends or payments that become payable before the seized shares are sold are treated, in effect, as accretions to the value of the shares (that it is hoped will be reflected in the sale price). Section 7(4) of the *Seizures Act* provides that seizure and sale of shares "shall include all dividends, premiums, bonuses or other pecuniary profits", and then goes on to provide that, after notice to the issuer, the dividends or other payments shall not be paid to anyone other than the person who purchases the shares from the sheriff. It seems more efficient to divert any amounts that become payable while the seizure is in effect to the sheriff, so that they can be distributed to enforcement creditors as soon as possible. Therefore, we recommend that, once the issuer or other relevant party has been served with notice of the seizure, any payments that would otherwise be payable to the enforcement debtor should instead be payable to the sheriff.

Where the enforcement debtor appears as the registered holder of the security in the books of the issuer, dividends or other payments payable in respect of the security would ordinarily[184] be payable by the issuer directly to the enforcement debtor. If seizure has been effected by service of a notice of seizure on the issuer, the issuer should be required automatically to divert such payments to the sheriff. If seizure has been effected by one of the other two methods (seizure of the relevant security certificates or notice to a third party) and the debtor is the registered holder of the security, the sheriff should be required to give notice of the seizure to the issuer. The issuer would then be required to divert dividends or other payments otherwise payable to the registered holder (the debtor) to the sheriff.

The situation is complicated somewhat because often a corporation's securities register is maintained by a transfer agent, one of whose tasks, might be the distribution of dividends on behalf of the issuer. It is conceivable that a dividend could be paid by a transfer agent to an enforcement debtor after the issuer has been served with a notice of seizure, but before the issuer has been able to advise the transfer agent of the seizure. Section 7(6) of the *Seizures Act* currently provides for this possibility by providing a grace period defined as "a period of time from the time of service sufficient for the transmission of notice of service by post from the place where it has been served to that other place".

We would also provide a grace period, but would define it more precisely than does section 7(6) of the *Seizures Act*. Forty-eight hours would seem to be a reasonable period within which an issuer could be expected to inform any relevant transfer agent of a seizure. We propose, therefore, that if a transfer agent pays a dividend to an enforcement debtor after service of a notice of seizure on the issuer, the issuer should be liable only if the transfer agent has been notified of the seizure or if 48 hours have elapsed since the notice of seizure was served on the issuer. If the transfer agent does pay the dividend to the enforcement debtor after it has been notified of the seizure, it should be required to indemnify the issuer.

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[184] An exception would be where the security in question was a bond that was registered as to principal only. In such a situation, the interest payments would be payable upon presentation of the relevant interest coupon.

Where the seized securities are publicly traded, we have seen that, often, the enforcement debtor will not be their registered holder. The registered holder of the securities is likely to be the debtor's broker or, even more likely, a depository. When dividends or other payments become payable, the issuer pays them to the registered holder, whether it be the debtor's broker or a depository. If the dividend or payment goes to a depository, the depository will, in turn, pay the broker an amount based on the broker's holdings of the security as disclosed by the depository's records. The broker then pays the debtor the amount to which the latter is entitled as the beneficial owner of the security.

In either variation of the situation just described, the broker is the appropriate point at which to intercept the payments. Thus, where seizure has been effected by serving a notice of seizure on a broker or other intermediary, the intermediary should be required to pay to the sheriff any payments in respect of the security that would otherwise be payable by the intermediary to the debtor.

It is possible that a dividend or other "payment" might require that the person who is entitled to receive it make some sort of election. For example, a dividend might be payable in cash or in shares, at the option of the shareholder. Where it is necessary to make such an election in respect of a seized security, the sheriff, rather than the enforcement debtor, should be entitled to make that election.

RECOMMENDATION 50:

DIVIDENDS AND OTHER PAYMENTS

Where the enforcement debtor is the registered holder of a security that has been seized by a method other than serving the notice of seizure on the issuer, the sheriff should be required to serve a copy of the notice of seizure on the issuer as soon after effecting seizure as is practicable.

Where a notice of seizure has been served on the issuer of a security of which the enforcement debtor is the registered holder, the issuer should be required to pay to the sheriff any dividend or other payment that it

would otherwise be required to pay to the enforcement debtor.

An issuer should not be liable if its transfer agent pays a dividend to the enforcement debtor after service of a notice of seizure on the issuer unless the transfer agent has been notified of the seizure or 48 hours have elapsed since the notice of seizure was served on the issuer. A transfer agent who does pay a dividend to an enforcement debtor after being notified of a seizure should be liable to indemnify the issuer.

Where the enforcement debtor is not the registered holder of the seized security, and seizure has been effected by serving the notice of seizure on a third party, the third party should be required to divert to the sheriff any dividend or other payment in respect of the security that it would otherwise be required to pay to the debtor.

The sheriff should be entitled to make any election that the enforcement debtor would otherwise be entitled to make with respect to a dividend or other payment.

(5) Liquidation of Publicly Traded Securities

The fact that, by definition, there is an established market for publicly traded securities considerably simplifies the sheriff's task in selling or otherwise realizing upon them. Realization can and should be accomplished through the normal market mechanism. In many cases, this would involve selling the securities through a broker. Indeed, where the securities were held for the enforcement debtor by a broker before the seizure, the simplest approach would usually be for the sheriff to direct the broker to sell the securities using the appropriate market mechanism.

As noted, the sheriff would usually realize seized publicly traded securities by selling them. But sale would not be the only possible method of realization; for example, if the security in question was a share in an open-ended mutual fund, the appropriate method of realization would be to require the fund to redeem the share.

We have emphasized the diminishing significance of security certificates in many transactions involving publicly traded securities; however, there will undoubtedly be cases where an enforcement debtor's securities are evidenced by specific security certificates, so that transfer of the securities would ordinarily require endorsement and delivery of the security certificates by the debtor. The sheriff who has seized such a security should have the authority to endorse the certificate or any other document that would otherwise have to be endorsed by the debtor.

What if the sheriff cannot get possession of a certificate that would ordinarily have to be delivered to transfer (or redeem) a publicly traded security? It would not do to allow the sheriff simply to transfer the security without the certificate. That could easily prejudice the issuer of the security if a *bona fide* purchaser showed up later with the security certificate. Therefore, in the case of securities whose realization would ordinarily require delivery of a security certificate, the general rule should be that this delivery requirement applies to the sheriff.

Laws dealing with negotiable instruments customarily make provision for the inevitable instances of lost, destroyed or stolen instruments. Generally, the owner of the missing instrument is permitted to enforce his rights under the instrument (or to get a replacement instrument), as long as the person against whom such rights are enforced is provided with a satisfactory indemnity against continuing liability on the instrument. The *Business Corporations Act*, for example, provides as follows in section 75(2):

> (2) If the owner of a security claims that the security has been lost, destroyed or wrongfully taken, the issuer shall issue a new security in place of the original security if the owner
>
> > (a) so requests before the issuer has notice that the security has been acquired by a bona fide purchaser and before a purchaser described in section 64 has received a new, reissued or re-registered security,
> >
> > (b) furnishes the issuer with a sufficient indemnity bond, and
> >
> > (c) satisfies any other reasonable requirements imposed by the issuer.

We propose that the court have the power to require the issuer to recognize a disposition by a sheriff of a seized security evidenced by a missing security certificate. This power could be exercised only if the court was satisfied on the following points:

1. the security certificate in question appears to have been lost, destroyed or wrongfully taken from the enforcement debtor;[185]

2. there is no evidence that the missing certificate has got into the hands of a purchaser for value whose interest in the security would have priority over the relevant writ or writs; and

3. an adequate indemnity bond has been provided to the issuer by the instructing creditor.

RECOMMENDATION 51:

REALIZATION OF PUBLICLY TRADED SECURITIES

A sheriff who has seized a publicly traded security should be authorized to sell or otherwise realize the security through the normal market mechanism.

Where it would ordinarily be necessary for the enforcement debtor to endorse a security certificate or other document to dispose of the security, the sheriff should be authorized to do so in place of the debtor.

Where the transfer or other disposition of a security would ordinarily require delivery of the security certificate, this requirement should apply to a disposition by the sheriff. If the court is satisfied, however, that:

(a) the security certificate in question appears to have been lost, destroyed or wrongfully taken from the enforcement debtor;

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[185] The following is a possible scenario. The enforcement creditor learns that the enforcement debtor owns, and is the registered owner of, shares in XYZ Ltd., and instructs the sheriff to seize these shares. The sheriff effects seizure by serving a notice of seizure on XYZ Ltd. and a copy of the seizure documents on the enforcement debtor. The sheriff then demands that the enforcement debtor surrender the share certificates, but the debtor claims that the certificates have been lost. This claim could provide the basis for an application to the court, although the instructing creditor would have to weigh the benefit of doing so against the risk involved in providing an indemnity to the issuer.

(b) there is no evidence that the missing certificate has got into the hands of a purchaser for value whose interest in the security would have priority over the relevant writ or writs; and

(c) an adequate indemnity bond has been provided to the issuer by the instructing creditor;

then the court should be able to require the issuer to recognize a disposition by the sheriff of the security represented by the missing certificate.

(6) Liquidation of Non-publicly Traded Shares

(a) Special problems

As far as efforts to liquidate them go, non-publicly traded shares are likely to have two disadvantages when compared to publicly traded securities (including publicly traded shares). One of these disadvantages is simply the natural consequence of the shares not being publicly traded. The sheriff's task is to sell the enforcement debtor's shares for a reasonable price. In the case of publicly traded securities, the sheriff will usually be able to take advantage of the ordinary market mechanisms (such as securities exchanges) to sell the shares for a reasonable price. But there is no "ordinary market mechanism" for selling non-publicly traded shares. They might indeed be extremely valuable, but determining their value, and finding a buyer who is willing to pay a price that reflects that value, might require much more ingenuity than is required for a publicly traded security.

The second disadvantage is that non-publicly traded shares are likely to have been issued by a corporation that is not a "distributing corporation" within the meaning of section 1(i) of the *Business Corporations Act*.[186] A corporation that is not a distributing corporation may place restrictions on the transfer of its shares, and is likely to have done so. A common restriction is one that requires the approval of any share transfer by the board of directors. Another is a provision that gives existing shareholders the first opportunity to buy any shares that are offered for sale. Such provisions, although consistent with the policy of corporations legislation, can throw up formidable obstacles to the liquidation of such shares when they are owned by an enforcement debtor.

Not every non-publicly traded share will be subject to a formal restriction on its transfer; however, all such shares have the characteristic of not being traded in an established market. This characteristic alone warrants special precautions to ensure that the liquidation of any non-publicly traded share is effected through a procedure that is likely to realize a reasonable price for the share. Thus, although the following discussion is concerned largely with problems arising from restrictions on transfer, the conclusions that we draw as to the appropriate procedural safeguards are applicable to non-publicly traded shares, whether or not they are subject to overt restrictions on transfer.

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[186] A corporation is a distributing corporation if 1) it has issued shares, or securities that can be converted into or exchanged for shares, as part of a distribution to the public, and 2) it has more than 15 shareholders.

(b) The present law

The procedure established by the *Seizures Act* for enforcement against shares is quite clearly intended to apply to shares with a transfer restriction. It also gives the other shareholders a measure of protection against sale to an unwanted stranger.[187] Section 7(10) provides:

> (10) If a sheriff seizes the shares of a debtor in a company, and the company's incorporating documents restrict or prohibit the right to transfer those shares, he shall first offer them for sale to the other shareholders, or any one of them, in the company, and shall send by mail to the company at its registered office and to at least 3 other shareholders, notice of the seizure, and shall sell the shares seized or any part of them to any shareholder who within 30 days of the date of the mailing of the notice
>
> (a) makes an offer for the purchase thereof at a price that appears to the sheriff to be reasonable, and
>
> (b) pays the purchase price to the sheriff.
>
> (11) Any shares referred to in subjection (10) that remain unsold at the expiration of the period of 30 days shall be sold by the sheriff in the same manner as any other personal property.

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[187] *Re Phillips and La Paloma Sweets Ltd.* (1921) 66 D.L.R. 577 held that the procedure could not apply to shares that could only be transferred with consent of the directors, only to shares that the debtor could freely transfer. This case was overruled by subsequent amendments to the *Seizures Act*. Now, s. 7(10) expressly contemplates enforcement against shares in a private company. The provision was amended in 1988 to take into account that the term "private company" does not appear in the *Business Corporations Act*: S.A. 1988, c. 31, s. 20. Section 7(10) now refers to shares where "the company's incorporating documents restrict or prohibit the right to transfer those shares".

This procedure, however, might be practically ineffective in many cases. Professor Dunlop describes the anomaly as follows:

> Suppose that the sheriff seizes shares in a company with a consent restriction on transferability. The sheriff sells the shares and the purchaser applies to the company to be registered as the new shareholder on the company books, but the directors refuse their consent. What can the purchaser do? The question is an important one. If the answer is that the purchase has no effective and relatively certain remedy, then it is unlikely that anyone will willingly put himself in such a position. The creditor might still have the shares seized to put some pressure on the debtor-shareholder but this kind of semi-blackmail is obviously a poor substitute for seizure leading to sale and registration of the purchaser as the shareholder.[188]

The present law is ambiguous in answering Professor Dunlop's question. A legal principle of imposing pedigree is clearly relevant:

> No proposition of law can be more amply supported by authority than that which the respondents invoke as the basis of the judgment under appeal, namely, that an execution creditor can only sell the property of his debtor subject to all such charges, liens and equities as the same was subject to in the hands of his debtor.[189]

Hutchinson J. of the Court of Queen's Bench recently applied this principle in the context of enforcement against shares:

> The sheriff can take no better title to the shares than the debtor had and therefore the sheriff must, in the absence of specific instructions to the contrary contained in the *Seizures Act*, comply with the restrictions contained in the articles of amalgamation relating to such shares.[190]

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[188] Dunlop, *supra*, note 1 at 166. See also B.V. Slutsky, *Execution Against Private Company Shares* (1972) 30 The Advocate 240, a comment on *Associates Finance Company Ltd. v. Webber and Dixon* [1972] 4 W.W.R. 131.

[189] *Jellet* v. *Wilkie*, *supra*, note 37 at 288-89.

[190] *Yorkshire Trust* v. *Bennet* [1987] 1 W.W.R. 238 (Alta. Q.B.). It happened that in this case the restrictions required that a complicated sale

(continued...)

Uncertainty arises, because it is not clear whether section 7(10) of the *Seizures Act* provides "specific instructions to the contrary". If it does not, then, in practice, shares with a transfer restriction that prevents sale to a purchaser not approved by the directors are exempt from seizure. As Belzil J.A. wondered in a similar context, "Who would buy this pig in a poke."[191]

It might be that the intention of the legislature has been rendered less uncertain by the 1988 amendment to section 7(10). It is now provided that the procedure applies where the corporation's incorporating documents "restrict *or prohibit*" the right to transfer the shares. Clearly, the sheriff is not to be bound by a provision that would have prevented the debtor from selling; however, a degree of uncertainty is still present and should be eliminated.

(c) Proposed reform

It is common for people in this province to hold shares with restricted transferability. The consequence of the present law is that a potentially significant source of creditor satisfaction can be inaccessible. We believe that shares should not be "exempt" for want of an effective enforcement process.

The law should be reformed to provide that a limitation on the transferability of seized shares or other provisions that would prevent effective transfer by the sheriff does not apply to a sheriff's sale. This should be so, whether the limitation is contained in the incorporating documents of the corporation or in a unanimous shareholders' agreement or anywhere else. Further, provisions in such corporate documents that provide for the sale of shares to other shareholders at less than fair value when enforcement is entered against one shareholder should be ineffective to frustrate enforcement.

We do not think it proper that creditors should bear the burden of the policy that permits corporations to control their membership. The burden of the policy should be borne by its beneficiaries, the corporation and its members. The law should give them generous opportunity to assume that burden, and that is the intent of our recommendations below; however, if the other shareholders are not willing or able to assume the burden of the policy, they should forfeit the benefit. The law should put the interest of creditors, in obtaining satisfaction of

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[190](...continued)
procedure be followed but did not prevent an eventual sale to a person not approved by the company. The sheriff was instructed to follow the complicated procedure in the company's articles. The procedures established by s. 7(10), (11) could not be used because this was not a "private" company. That term does not appear in the *Business Corporations Act*, and at the time of the case the terminology used in the *Seizures Act* had not been updated. The case does not therefore determine whether s. 7(10) provides the "specific instructions to the contrary" that Hutchinson J. said would be required.

[191] *McNeil* v. *Martin and Peters* (1983) 23 Alta. L.R. 318 (Alta. C.A.).

the debts owed to them, ahead of the interest of shareholders in controlling the membership of their corporation.[192]

Professor Slutsky, commenting on a decision of the British Columbia Supreme Court,[193] which held that the purchaser from the sheriff is unaffected by transfer restrictions, said:

> The small, closely held private company is, in economic reality, nothing more than an incorporated partnership, where trust and mutual confidence amongst the members (or "partners") is absolutely essential for business efficiency. One shudders to think of the consequences of allowing strangers (perhaps even competitors) to be foisted upon innocent and unwilling "partners".[194]

We agree that the comparison to partnership is apt and observe that the *Partnership Act* prescribes an alternative to an unwanted "foisting" that does not deny creditor access to a debtor's partnership interest. Under the *Partnership Act*, although an execution debtor's partnership interest cannot be seized, the creditor can obtain an order charging the interest with the amount of the execution debt.[195] The other partners have the right to redeem their partner's interest from this charge anytime.[196] They also have the right to dissolve the partnership.[197] If there is no redemption, the debtor's partnership interest can be foreclosed.[198] If the interest is acquired by the creditor or sold to a stranger in the foreclosure proceedings, the existing partnership is dissolved and either liquidated or reformed with the purchaser included as a partner. In either case, the value of the debtor's partnership interest is released to his creditors.

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[192] Our conclusion is consistent with that reached by the Law Reform Commission of British Columbia, in LRCBC Shares, *supra*, note 103. The Ontario Law Reform Commission recommended that the consent restriction not apply to a sheriff's sale only where the debtor is the owner of 100% of the shares of the company in question. In other cases, the directors would be statutorily required not to arbitrarily or unreasonably withhold consent. Where consent was denied the onus would be on the sheriff to establish that the directors were acting arbitrarily or unreasonably: OLRC Part 2, *supra*, note 57 at 73.

[193] *Associates Finance Company Ltd. v. Webber and Dixon*, *supra*, note 188.

[194] Slutsky, *supra*, note 188 at 246.

[195] *Partnership Act*, s. 26.

[196] *Ibid*. s. 26(2).

[197] *Ibid*. s. 36(2).

[198] *Ibid*. s. 26(2)(b).

In the case of a partnership, therefore, the interest of the other partners in controlling membership in the partnership is protected by their ability to redeem, to buy the debtor's interest themselves, or to dissolve the partnership. We think that the protection for the co-shareholders of a debtor shareholder should be parallel. They and the corporation should be given the right to pay the shareholder's debts and have the seizure released (in effect to take an assignment of the creditor's claim against the debtor). They should continue to have a right of first refusal on the sheriff's sale, and that right should be extended to the corporation as well. They should have the right to wind the corporation up rather than have to accept a stranger as a shareholder. If that alternative were chosen, the debtor's share would be liquidated and paid to the sheriff.

In addition, we think that the corporation and its shareholders should have the right to make any other proposal for the satisfaction of the debt, which would avoid winding up or a sale of the debtor's share to a stranger. Perhaps, for example, the shareholders might propose the payment of the value of the shares over time with interest. If the creditors were not prepared to accept a proposal, the other shareholders should be at liberty to apply to the court, which would approve the proposal if it did not cause prejudice to the creditors.

We think, however, that the intrusion on the rights of the other shareholders should go no further than necessary. Where the corporation's incorporating documents establish a procedure for the transfer of shares that does not prevent a sheriff's sale from taking place, or the purchaser at a sheriff's sale from being recognized as a shareholder by the corporation, that procedure should be followed. The statutory sale requirements should be a minimum procedure. The corporation procedures, where they do not violate the policy of the statute, should be followed as well.

We recognize that it might be difficult for the sheriff to interpret the provisions of the corporation's incorporating documents when determining the procedures that he must follow. Accordingly, we propose that the sheriff should advise the corporation of the process that he intends to follow before he embarks upon it. As well, the sheriff should be at liberty to seek directions if it appears that assistance in establishing the procedure is required. The corporation should be at liberty to seek intervention by the court if the procedure proposed by the sheriff does not meet the requirements of the corporation's rules and if it appears that the corporation will be prejudiced as a result.

We expect that a comparison might be drawn between the manner in which we propose this policy issue be resolved and the proposals that we make in the next chapter with respect to enforcement against jointly held land. In that discussion, we conclude that jointly owned land should cease to be bound upon the death of the debtor joint tenant. The binding effect should be subject to the right of survivorship, which is a fundamental incidence of joint tenancy. We apply the principle that the purchaser from the sheriff can obtain no better interest than the debtor had. We note that the number of occasions when this survivorship and principle frustrate creditors must be low. We conclude that a fundamental change in the law of joint tenancy is unwarranted.

The consequence of applying the same principle in the context of enforcement against shares, however, would be of a wholly different magnitude. Its application would deny creditor access to a significant source of potential debt satisfaction. We think that the principle should not be applied in this context. An exception to the usual corporation law principle that the corporation can control its own membership is warranted.

The issue discussed above does not arise in the context of shares where the restriction on transferability does not prevent the purchaser from registering the purchase and exercising shareholder rights. Neither does it arise in the context of distributing corporations where the shares are traded publicly and the corporation asserts no control over membership.

RECOMMENDATION 52:

REALIZATION ON SHARES WITH A TRANSFER RESTRICTION

Where the sheriff seizes shares of a debtor in a corporation, and the corporation's incorporating documents, unanimous shareholders' agreement, or other documents restrict or prohibit the right to transfer those shares, such restriction or prohibition should not apply to the sale by the sheriff.

Provisions in such corporate documents that provide for the sale of shares to other shareholders at less than fair value, when enforcement is entered against one shareholder, should be ineffective to frustrate enforcement.

The other shareholders, severally and collectively, and the corporation should have the right to:

a) discharge the debt and have the seizure released;

b) purchase the shares before anyone else;

c) have the corporation wound up before the shares are offered for sale;

d) make any other proposal to the sheriff and creditors as an alternative to the sale of the shares; and

e) seek approval of such a proposal by the court where the sheriff and the creditors do not accept it. The court should approve such a proposal where it will not cause substantial prejudice to the creditors.

The sheriff should give the corporation and the creditors notice of the process by which he proposes to dispose of the shares. That process should include any procedures required by the corporation's incorporating documents that will not prevent the sale. The sheriff should be at liberty to seek directions from the court in establishing the sale process. The corporation should be at liberty to seek the intervention of the court to require the sheriff to include in the proposed method of sale any requirement of the incorporating documents that he has omitted, except those that would prevent the sale. The court should order the sheriff to include the procedure that will not prevent the sale, and the omission of which would be prejudicial to the interests of the corporation.

The enforcement process should be designed so as to give the corporation and the other shareholders generous opportunity to preserve the membership of the corporation, but if they do not or cannot avail themselves of that opportunity, enforcement should not be frustrated. Any restriction on the transferability of shares that would prevent the purchaser from registering the purchase and exercising shareholder rights should not apply in a sale under a writ of enforcement.

(7) Valuation of Shares

In the case of publicly traded securities, the sheriff will have little difficulty determining that the price of any proposed sale is reasonable. But in the case of non-publicly traded shares, valuation could be a significant problem. The sheriff will be under a duty to sell the shares at a commercially reasonable price. How is he to know what price to set? How is he to know whether the price offered by an existing shareholder or a stranger is reasonable?

The problem is not unique to shares. Valuation of property by the sheriff is a problem wherever there is no regular market for the property; however, for most other forms of property that the sheriff might seize, the market is more regular than it is for shares in a non-distributing corporation. There are methods, nevertheless, by which a reasonable price can be set for any block of shares in a private corporation, and there are experts readily available to assist the sheriff in arriving at a reasonable valuation.

The main source of the problem is that the sheriff, who has the responsibility to obtain a reasonable price, ordinarily does not have access to the information upon which a valuation might be made. We think that it is possible to remedy this situation to some extent.

The ABCA requires the corporation to provide its shareholders with financial statements, auditors' reports, and any other financial information required by the articles, by-laws, or unanimous shareholders' agreement.[199] The corporation is also required to keep copies of its financial statements available for inspection by shareholders, their agents or personal representatives at the corporation's records office during normal business hours.[200]

It seems reasonable that, where shares are subject to enforcement proceedings, the sheriff should acquire the shareholders' entitlement to the financial disclosures referred to above. This information would permit a person with the necessary expertise to make at least a *prima facie* evaluation of the seized shares against which the sheriff could assess offers. So that the sheriff can conduct the sale at least as effectively as the debtor could, the sheriff should have the same rights regarding disclosure of that information to potential purchasers as the debtor would have had.

If there was no willing buyer at what the sheriff—armed with this financial information—considered a reasonable price, he could invoke the procedure that we have previously proposed for the sale of tangible property in the equivalent situation. The sheriff could apply to the court for leave to sell the shares at the best obtainable price. We see no reason why shares should be treated differently than any other property is treated in this regard.[201]

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[199] *Business Corporations Act*, s. 149.

[200] *Ibid*. s. 151.

[201] The British Columbia commission does not seem to share this view: see LRCBC Shares, *supra*, note 103 at 67 (s. 116(1)):

> No share shall be disposed of under this Part by the sheriff . . . unless the disposition is commercially reasonable.

RECOMMENDATION 53:

FINANCIAL INFORMATION ON THE CORPORATION

Upon service of a notice of seizure in respect of shares of a corporation, and upon seizure of negotiable shares, the sheriff should become entitled to receipt of the financial information to which a shareholder in the corporation is entitled.

The sheriff should use that information to determine the value of the shares against which enforcement is proceeding and in assessing offers made for the shares in the course of the sale process. In conducting the sale, the sheriff should be able to use the information in any way that the debtor could use it.

Where the sheriff is not able to effect a sale at a price he considers reasonable, he should be at liberty to apply to the court for authorization to sell the shares at the best obtainable price.

C. The Debtor's Interests as a Secured Creditor

An enforcement debtor who is a secured creditor under a chattel mortgage, conditional sales contract, land mortgage, corporate debenture or similar instrument has both an entitlement to receive payment of the secured debt and an interest in the property that secures the debt. It is necessary that the enforcement procedure available to the enforcement debtor's creditors take this into account.

The *Seizures Act* provides a process for enforcement where the judgment debtor holds a security interest in sections 8 and 9:

> 8(1) A sheriff charged with the execution of a writ of execution may seize thereunder any registered mortgage of or encumbrance on land or chattels of which the debtor is the owner, by delivering a notice in writing of the seizure to the proper officer in the office in which the mortgage or encumbrance is registered.

> (2) No mortgage or encumbrance is affected or charged by a writ of execution until delivery of the notice.
>
> (3) On receipt of the notice by the proper officer, he shall make an entry thereof in the register or other record in which the mortgage or encumbrance is registered, and the proper officer is entitled to receive a fee of $1 for so doing.
>
> (4) No person who is liable to pay money under a mortgage or encumbrance seized pursuant to this section is affected by the seizure until
>
> > (a) notice in writing or the seizure has been served on him personally, or
> >
> > (b) he has otherwise acquired actual knowledge of the seizure.
>
> (5) Any payments made by that person to the debtor after service of the notice of the seizure or after acquiring actual knowledge of the seizure are of no effect as against the sheriff and the creditor.
>
> 9 No mortgage or other security for money seized under a writ of execution shall be sold except on the order of the Court and then only on any condition the Court thinks fit to prescribe.

The scope of this section has been clarified recently by amendments to the *Seizures Act* contained in the PPSA. Section 8(1) has been amended so that it applies to "any registered mortgage or encumbrance on *or security interest in* land or chattels". "Security interest" has been defined as "an interest in goods that secures payment or performance of an obligation". Any uncertainty as to whether the process applies to conditional sales contracts or security lease arrangements has been removed.

The procedure is a hybrid of enforcement by notice and garnishment. Third parties, who might take an assignment of the mortgagee's interest from the debtor, are protected by the registration of the notice in the registry that they would search, in any event, to ensure that the security is in force. The payments by the mortgagor or conditional sales purchaser are diverted to the benefit of creditors in the same way as a debt payable to the debtor is diverted in the garnishment process.

Clearly, one part of this section would clearly not be appropriate in the enforcement system that we recommend. We have recommended that all the debtor's personal property be bound from the time that the writ is registered in the PPR, and all the debtor's interests in real property be bound from the time that the writ is registered against the title to the land in the Land Titles Office. These recommendations would make section 8(2) inappropriate in the reformed legislation. Registration of the writ in the PPR and the Land Titles Office would, in any event, accomplish whatever purpose is served by section 8(2).

(1) Method of Enforcement

In the discussion of enforcement against interests in land that appears in the next chapter, we recommend that enforcement against a particular interest in land be initiated by registration of a "Notice of Sale" by the creditor on the title to the land in which the debtor holds an interest. We think that this procedure would serve the purpose that is served at present by the notice contemplated by section 8(1) of the *Seizures Act* in the context of the land mortgages.

Is a "seizure by notice" process appropriate for chattel security agreements? The Law Reform Commission of British Columbia maintained that commercial practice in relation to these securities made physical seizure of the "chattel paper" a more appropriate enforcement method than garnishment. It said:

> Generally speaking, professional financiers deal in chattel paper at face value in the sense that if a prospective assignor has possession of the paper and the paper appears regular they do not feel that any further inquiry into the assignor's entitlement to payment is called for. This practice may, however, leave them vulnerable to a prior garnishment or the underlying account debt which is unknown to, or has been concealed by, the assignor.[202]

We think that professional financiers who treat a chattel security as if it were a negotiable instrument can be protected by a provision modelled on section 31(5)(a) of the PPSA:

> (5) A purchaser of chattel paper who takes possession of the chattel paper in the ordinary course of his business and for new value has priority over any security interest in it that
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> > (a) was perfected under section 25 if the purchaser does not have knowledge at the time of taking possession that the chattel paper is subject to a security interest . . .

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[202] Law Reform Commission of British Columbia, *Report on Attachment of Debts Act*, (Vancouver: LRCBC, 1978) at 56 [hereinafter LRCBC Attachment].

We conclude that the enforcement by notice process established by section 8 is satisfactory and should be continued in the reformed legislation. It would be similar to the procedure we have proposed for the seizure of serial-numbered goods. On receipt of instructions from the creditor, the sheriff would register a notice of enforcement as a financing statement in the PPR. He would serve the notice on the debtor, along with a notice of objection[203] in the same manner as we have recommended in the process of enforcement against serial-numbered goods.[204]

RECOMMENDATION 54:

ENFORCEMENT AGAINST DEBTOR'S INTERESTS AS A SECURED CREDITOR

Enforcement against a debtor's security interest in real property should be accomplished by the sheriff registering a notice of sale, on instruction from the creditor, on the title to the land in which the security interest is held according to the procedure recommended hereafter for enforcement against land.

Enforcement against a debtor's security interest in chattels should be accomplished by the sheriff registering a financing statement in respect of the enforcement against the debtor in the PPR.

The sheriff should also serve a notice of enforcement and a notice of objection on the debtor according to the procedure recommended for the seizure of serial-numbered goods.

(2) Realization on Seized Security Instruments

Section 8 of the *Seizures Act* contemplates two means of realization on the debtor's interest as a secured creditor. First, section 8(4) provides that the sheriff, by serving notice on the party liable under the security, becomes entitled to receive the periodic payments, due to be made by the debtor's debtor, for the benefit of creditors. Second, section 9 contemplates that, with court permission, the sheriff can sell the security interest in the same manner as other seized property. With some modifications, we would continue both these methods of realization.

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[203] In this respect, the procedure would not parallel the system for land where no notice of objection is served.

[204] Section 43(11) of the PPSA requires that financing statements registered in the PPR be served on the debtor within 15 days.

As to the first means of realization, section 8 does not discuss the remedies that would be available to the sheriff if the party liable under the security agreement defaults. We would propose that the reformed statute authorize the sheriff to exercise any and all of the rights of the debtor to enforce the security agreement including foreclosure, distress or repossession. In the case of chattel security, having repossessed the chattel, the sheriff could proceed to sell it for the benefit of creditors. The Ontario legislation has recently been amended to give the sheriff this authority.[205]

As to realization by sale of the security agreement itself, we do not think that it is necessary to continue the present section 9 requirement of a court order authorizing such a sale. It is not certain why that requirement exists. It might be intended to provide an opportunity for the debtor to object that is not otherwise present in the section 8 procedure. If that is the reason for the requirement, our proposal that the process be subject to the normal objection procedure would eliminate the need for the court order.

So that a prospective purchaser would know exactly what he or she was buying, it might be practically necessary that the sheriff obtain possession of the actual security document for that purpose, unless there were some other way to determine its exact terms. In that regard, the *in personam* remedy discussed in Chapter 8 of this report could be invoked.

RECOMMENDATION 55:

REALIZATION ON SEIZED DEBT SECURITY AGREEMENTS

Payments to be made to the debtor under seized debt security agreement should be diverted to the sheriff

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[205] *Execution Act*, R.S.O. 1980, c. 146, s. 26 (as am., S.O. 1989, c. 16, s. 83):

> (7) In addition to the remedies provided in this Act, upon seizure of the security interest, the sheriff has all the rights and remedies of the execution debtor under the security agreement and the *Personal Property Security Act*, and the sheriff is entitled to a bond of indemnity sufficient to indemnify against all costs and expenses to be incurred by the sheriff in the enforcement of the security agreement.

upon the sheriff serving the party obliged to make those payments with an appropriate notice.

The sheriff should be able to collect the payments due and to enforce the security in the same manner as the debtor if the party obligated under the security agreement is in default.

The sheriff should also be able to sell the security agreement as he would sell any seized property. The present requirement of a court order to authorize such a sale should be abandoned.

CHAPTER 6
LAND

A. Issues for Reform

In our Report for Discussion, we identified two major aspects of the law governing enforcement against land that require reform attention.

The first related to the scope of enforcement against land. It is not certain whether or not several interests in land are exigible. We suggested that all interests in land should be exigible, subject only to such exemptions as are appropriate for "the survival of the debtor or for his or her work."[206]

Second, we observed that the mechanics of enforcement against land in the existing legislation are unsatisfactory. The statutory provisions that establish the present process are inconsistent, incomplete and confusing. It is necessary that these provisions be rationalized, the procedural gaps be filled, and the process be simplified.

B. Exigibility of Interests in Land

The idea that all interests in land should be exigible is not controversial. Professor Dunlop begins his discussion of the subject by observing:

> It is commonly assumed by lawyers, judges and (most important for this purpose) land registrars and sheriffs that all interests in land are exigible, at least where they are registered. The notion that some types of realty may simply fall outside the grasp of the judgment creditor seems to arouse deep and violent resistance in the breasts of those who operate the creditor's rights system.[207]

As well, he observes that the legislation does not necessarily parallel this commonly held assumption and concludes:

> The judges have, with some exceptions, tended to be restrictive and timid in their reading of execution statutes with the result that the exigibility of many interests in real property is doubtful today in the absence of remedial legislation.[208]

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[206] Report for Discussion, *supra*, note 4 at 315.

[207] Dunlop, *supra*, note 1 at 175.

[208] *Ibid*. at 176.

Curiously, the present legislation does not include an express statement that land is exigible.[209] There are, however, many inferences to that effect and these have generally been considered strong enough for all practical purposes. Perhaps the strongest implication comes from Rule 347, which states:

> Every writ of *fieri facias* shall be issued against both the goods and lands of the debtor.

In addition, the *Land Titles Act* section 122(2)(a) provides:

> On and after the receipt by the Registrar of the copy of the writ [of execution certified by the sheriff], all legal and equitable interests of the execution debtor in any land there or thereafter registered in his name and including his interest, if any, as an unpaid vendor of the land, are bound by the execution . . . .[210]

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[209] One commentator has suggested that the exigibility of land in Alberta is tenuous. James Rout argues, in an unpublished LL.M. thesis, "Execution Against Land in Alberta", 1976, at 33-49, that the imperial legislation of 1732, which made land in the American colonies exigible under a writ of *fieri facias*, was not part of the law of England that was received in 1970 in what was to become Alberta. Alternatively, if it was adopted, it was repealed by the 1887 *Law Revision Act*, which was "an Act of the Parliament of the United Kingdom applicable to the Territories" within the meaning of s. 11 of the *North-West Territories Act*.

Further, the *Judicature Ordinance* of the North-West Territories, which provided for the use of a separate writ for execution against land, was in force in Alberta in 1905 but was repealed impliedly by the Alberta Rules of Court in 1914 and repealed expressly by the Alberta *Judicature Act* of 1919.

[210] The *Land Titles Amendment Act*, 1988, abolishes registration of writs of execution in the general register and requires them to be registered on the title of the land in which the debtor has an interest. Section 122(2) is repealed and replaced by s. 17.1(8), which provides:

> (8) Where a memorandum of a writ of execution or other instrument referred to in subsection (1) or a caveat protecting either of them is endorsed on a certificate of title,
>
> > (a) in the case of a writ of execution, all legal and equitable interests of the debtor in the land included in the certificate of title are bound by the writ of execution, and

(continued...)

The *Seizures Act* deals with two particular interests in land. Section 5 expressly authorizes the seizure of "any leasehold interest in land and any other chattels real that are property of the debtor". Section 8 authorizes the seizure of "any registered mortgage of or encumbrance on land", and provides a procedure for doing so.

Section 15 of the *Seizures Act* describes some aspects of the process of sale of land under a writ of execution, thus providing a reasonably strong inference that land is exigible.

Notwithstanding the practical strength of these inferences, we recommend that the exigibility of land not be left to inference. The legislation should provide that all interests in land are exigible, whether registered, unregistered, legal or equitable, and whether classified as real or as personal property.

As for the form that such a provision should take, we note the concern that a too general statement might risk the exclusion of rights associated with land that do not properly come within the term "interest in land" as it has been judicially interpreted. We are also aware of the possible inadequacies of present provisions, which have attempted to shore up a general statement with lists of specific interests.[211]

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[210](...continued)

> (b) in the case of an instrument, the
> interests of the debtor in the land
> included in the certificate of title are
> bound or charged in accordance with
> the Act that authorized registration of
> the instrument,
>
> during the period of time that the writ of execution
> or other instrument is in force.
>
> The repealing of s. 122(2) is not effective until three years after the proclamation of s. 17.3 of the *Land Titles Act*, which requires the Registrar to maintain records that will permit searches by name to determine what land is owned by a person.
>
> Section 17.3 has not been proclaimed.

[211] Dunlop, *supra*, note 1 at 175.

The Ontario Law Reform Commission[212] and the Law Reform Commission of British Columbia[213] have recommended that the issue be approached through a recasting of the definition of "land" in the context of execution.

In its report on enforcement against land, the Ontario Law Reform Commission pursued the same objective that we pursue in this report:

> . . . *prima facie,* every right, title and interest of the debtor in every kind of real and personal property should be subject to execution, and . . . any immunity of property from execution should depend on its deliberate protection by explicit exemption legislation.[214]

The Commission recommended the enactment of:

> . . . a general, comprehensive definition of "land" to make it clear that every right, title or interest in respect of land, whether legal or equitable, is subject to enforcement measures.[215]

In addition, they recommended that the general definition be supplemented by provisions listing several specific interests in land exigible at present by virtue of provisions scattered throughout various statutes, and at least one interest that had been held not exigible: the interest of the purchaser under a not yet completed agreement for the purchase and sale of land.[216] The definition of land contained in the British Columbia legislation provided an example of the kind of provision the Ontario Commission had in mind.[217]

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[212] Ontario Law Reform Commission, *The Enforcement of Judgment Debts and Related Matters,* Part III (Toronto: OLRC, 1981) at 10 [hereinafter OLRC Part 3].

[213] Law Reform Commission of British Columbia, Working Paper No. 22, *The Enforcement of Judgments: Execution Against Land* (Vancouver: LRCBC, 1976) at 11-4 [hereinafter LRCBC Land].

[214] OLRC Part 3, *supra,* note 212 at 5.

[215] *Ibid.* at 10.

[216] In *Kimniak* v. *Anderson* [1929] 2 D.L.R. 904 (Ont. A.D.), it had been held that such an interest was too indefinite to constitute an equitable interest in land because it was limited to a right to have a court of equity determine whether specific performance would be ordered. Accordingly, it was not exigible. A later case, *J.A.R. Leaseholds Ltd.* v. *Tromet Ltd.* (1964) 48 D.L.R. (2d) 97 (Ont. C.A.), held that the interest was an equitable interest, and thus presumably overruled *Kimniak.* However, exigibility was not at issue in *Tromet,* so its effect on the narrow point in *Kimniak* was uncertain.

We would not employ a definitional approach. As observed above, all interests in land should be exigible subject only to intentional exemptions. A definition of land in this context might imply some limit to the scope of exigibility. To define is to limit. We would therefore avoid any provision that purported to define "land".

Under the legislation that we propose, the exigibility of any property or asset would not depend on its being held to be included in any particular class of asset or interest. For example, debtors could not avoid enforcement against their right as a purchaser under an uncompleted agreement for sale on the basis that such a right is not included in the category "interest in land". If indeed it was not properly an interest in land, as long as it was an asset capable of legal existence it would be exigible.

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[217] *Court Order Enforcement Act*, R.S.B.C. 1979, c. 75, s. 74:

> "land" includes every right, title and interest in it, and all real property, both legal and equitable, and of every nature and kind, and any contingent, executory or future interest in it, and a possibility coupled with an interest in the land or real property, whether the object of the gift or limitation of the interest be ascertained or not, and also the right of entry, whether immediate or future and whether vested or contingent, into and on any land, and includes:
>
> a. the respective interests of mortgagor and mortgagee under a valid and subsisting mortgage of land;
>
> b. the respective interests of vendor and purchase under a valid and subsisting agreement for the sale and purchase of land
>
> c. the interest in land of a joint tenant, whether or not subject to a mortgage; and
>
> d. the interest in land of a tenant in common,
>
> but does not include the rights of a lien claimant under the *Builders Lien Act*.

RECOMMENDATION 56:

EXIGIBILITY OF INTERESTS IN LAND

All interests in land, regardless of whether they are legal, equitable, registered, unregistered, classified as interests in land or classified as personalty, should be exigible, except those that are deliberately exempted. Exigibility should not depend on whether the interest can be classified as an "interest in land".

C. Initiation of Enforcement Against Specific Registered Interests in Land

In our discussion of the writ of enforcement and its binding effect, we recommended that the debtor's interest in land should be bound from the time the writ is registered in accordance with the provisions of the *Land Titles Act*.[218] We wish now to consider the procedure by which enforcement against interests in land should be carried out after the registration of the writ at the Land Titles Office.

In the present system of execution against land, the writ of execution plays a double role. It is, in its first role, a part of the step-by-step enforcement process leading to an execution sale that produces funds to satisfy creditors. In its second role, it functions (at least practically) as a form of security, charge or encumbrance against the land in favour of the creditor.

The system is ineffective in its first role. In Alberta, the realization of funds to satisfy debts is rarely accomplished by execution sales of land. In our Report for Discussion, we suggested this is because the process is complex and the details of its operation are uncertain.[219]

In its second role, however, the existing system has been extremely effective. Registration of the writ of execution at the Land Titles Office frustrates any attempt by debtors to deal with their land. A debtor who wishes to mortgage or sell must first satisfy the writ, otherwise any mortgage or transfer would be registered subject to the writ. Obviously, this would not be satisfactory to the mortgagee or purchaser.

The success of the second role depends on the debtor eventually wishing to deal with the land and the creditor being prepared to wait. Although we do not recommend any change that would impair this aspect of the process, we think that it should not be the only practically effective method of enforcement against land. The process should be reformed as required to make it a functional part of enforcement law, and not merely a handy by-product of land titles registration law.[220]

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[218] See Recommendation 12, *supra*, at 44.

[219] Report for Discussion, *supra*, note 4 at 320. For a description of the complex and uncertain process, see the annotation to *Westhill Leasing Corporation Ltd.* v. *Rideout* (1983) 25 Alta. L.R. (2d) 229.

Section 15(2) of the *Seizures Act* stipulates that "[n]o land shall be sold under a writ of execution until after the giving of such notice of the sale by advertising or otherwise as may be directed by the Court". This requires that the process of selling a debtor's land commence with an application to the court. Although the wording of the section suggests that the court's only role on this application is to give directions as to the method of giving notice of sale, the case law tells us that the court's first task is to determine whether there should be any sale at all.[221] In particular, the enforcement creditor must establish that the land is not exempt.[222] Only after the court is satisfied that the land should be sold does it reach the matter expressly contemplated by section 15(2): giving directions about how the sale is to be effected.

There are several respects in which the procedure for selling land under a writ can be improved. Indeed, substantial improvement could be effected simply by making it clear what the procedure is. The legislation — in particular, section 15(2) — gives almost no guidance to the enforcement creditor as to how to proceed ("apply to the court for directions"), and gives no guidance to the court when the creditor does apply for directions. We think the statute should provide a clear procedure that can be followed by enforcement creditors and sheriffs to effect the sale of land. Moreover, we believe that the procedure should allow for land to be sold without anyone having to apply to the court, unless there is an issue, such as exemptions, that really does require a decision from the court.

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[220] In any case, the effectiveness of the system in its second role will be diminished by the abolition of the General Register when the recent amendments to the *Land Titles Act* are proclaimed: *Land Titles Amendment Act*, 1988, ss 8, 9. As a result of these amendments, it will be necessary for the creditor to register the writ on the title to the land in which the debtor holds an interest. Once registered on title, the writ will function in respect of that particular land in the same way that it functions at present when registered in the General Register. At the time of registration, creditors will be able to search land titles records by the name of the debtor to determine which titles the writ should be registered on; however, creditors will lose the ability to automatically bind interests in land acquired by their debtors after registration. To have binding coverage of the same scope as they have under the present General Register system, creditors will have to search regularly by the name of the debtor. The establishment of a facility to search by name of the owner of the interest in land does not wholly compensate creditors for the loss of the General Register.

[221] *Westhill Leasing Corporation v. Rideout, supra*, note 219.

[222] *Ibid.*

We propose that an enforcement creditor should initiate the sale of an enforcement debtor's land by instructing the sheriff to sell the land. The sheriff would then issue a notice of sale, which would be recorded on title and served on the debtor and any other person with an interest recorded on title. The sheriff would also register the notice of sale in the Enforcement Registry.

The content of the notice of sale would be similar to that of the present notice of seizure. It would contain details of the procedure that we describe in the remainder of this chapter, expressed in the simplest and clearest terms possible.

Recording the notice on title would serve to inform anyone searching the title that the land is in the process of being sold under a writ. It would perform a function similar to that of a *lis pendens*.

At present, the *Seizures Act* provides, in section 5, for the seizure of leasehold interests in land, and in section 8, for the seizure of the mortgagee's interest in a mortgage. We think that the notice of sale procedure will work well in both cases, assuming that, in the case of the lease, the interest is registered. In the case of the mortgage, the procedure is close to that already prescribed by section 8. It will be necessary, however, to ensure that the procedure for redirection of mortgage payments, now accomplished by section 8(4), is continued and that the ability of the sheriff to enforce the terms of the mortgage, if the mortgagor is in default, is established. We have discussed these points previously in the context of enforcement against the debtor's interests as a secured creditor.[223]

RECOMMENDATION 57:

INITIATION OF SALE OF REGISTERED LAND

Enforcement against interests in registered land should be initiated by the creditor instructing the sheriff to sell the land. The sheriff would then issue a notice of sale, which would be recorded on title and served on the debtor and all parties having an interest recorded on title. The sheriff would enter the notice of sale in the Enforcement Registry.

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[223] See *supra*, at 153.

D. Procedural Restrictions on Enforcement Against Land

There are three procedural restrictions on the use of the present land execution procedure. All are contained in section 15 of the *Seizures Act*.

First, unless the court otherwise orders, land cannot be sold in execution until the sheriff has made a "return *nulla bona*"[224] to the writ of execution.[225] This means that the sheriff must have received instructions to effect seizure of personalty under the writ and has been unable to seize property sufficient to satisfy the execution.

Second, unless the court otherwise orders, execution against land cannot proceed to sale until one year has expired from the date that the Registrar of Land Titles received the writ of execution.[226]

The third provision discourages, rather than restricts, use of the process. If a creditor has taken steps to advertise land for sale in execution and the execution debt is satisfied not by sale of land but by execution against goods and chattels, the creditor cannot recover the costs of advertising the land.[227]

Similar restrictions in the Ontario system of execution against land were examined by the Ontario Law Reform Commission. Although it was not clear to the Commission why such restrictions were placed in the procedure, they speculated that:

> . . . given the era in which the requirements were adopted, it is probably also safe to surmise that, at least in part, they reflected an attitude that regarded land as inherently more worthy of protection than other forms of property.[228]

The Ontario Commission made the following observations with regard to the propriety of restrictions on enforcement against land in general:

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[224] Black's Law Dictionary defines *nulla bona* as:

> The name of the return made by the sheriff to a writ of execution, when he has not found any goods of the defendant within his jurisdiction on which he could levy.

[225] *Seizures Act*, s. 15(1)(a).

[226] *Ibid*. s. 15(1)(b).

[227] *Ibid*. s. 15(4).

[228] OLRC Part 3, *supra*, note 212 at 18.

> The central role of land in the economic and social system may have warranted this attitude at one time; but today, when a significant percentage of the population has come to see it as just another commodity, albeit often a very valuable one, it no longer can be asserted categorically that land deserves protection simply because it is land.
>
> There are, however, more functional considerations associated with land, which we believe to be sufficiently compelling to justify a departure from the rule of immediate, unrestricted exigibility. The first of these is that, generally, the value of a debtor's land is very large in comparison to the size of the judgment debt. A related factor is that a debtor with land often will be able to use that property to refinance his obligations, including the judgment debt. While the law should promote recovery by the creditor, it clearly should not unnecessarily strip the debtor of his assets, but should encourage settlement where this may be achieved without resort to a forced sale. Where there is a good possibility that the debtor can refinance, and thus avoid an execution sale and its attendant costs and disruption, he should be provided with an opportunity to do so.
>
> Experience also indicates that, as a rule, the loss of real property is potentially more disruptive for the debtor's living or business arrangements than the loss of other types of property. This result is not solely because interests in land are normally of substantial value. A significant proportion of land is used for residential purposes, and land is often the basis of the debtor's livelihood, whether it be an individual's farm or the site of a corporation's plant.[229]

Applying these and other considerations, the Ontario Commission recommended that the 12-month delay restriction be reduced to six months, and that the *nulla bona* restriction, the costs discouragement, and a fourth restriction not present in the Alberta procedure — a minimum judgment amount — be abolished.[230]

As for the 12-month delay, the Commission thought that a delay of some duration was the best way to provide the debtor with the opportunity to refinance his obligations and to avoid the forced sale of his land; however, they also thought that 12 months was too long. If the debtor is serious about refinancing, this could be accomplished it in less than 12 months. Further, a delay of that duration might allow a substantial deterioration in the property to take place if the debtor, because of the threatened sale, loses interest in it.

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[229] *Ibid.*

[230] *Ibid.* at 19-23.

As for the *nulla bona* restriction, the Commission concluded that a creditor will probably not embark on the sale of land process lightly. If there is personal property readily available against which execution can proceed, the creditor is likely to prefer to invoke enforcement against it. In any case, if there is personal property available, the debtor would have time to dispose of it and to pay the judgment with the proceeds before the sale of the land proceeded far.[231]

The Ontario Commission thought that the costs discouragement provision was inconsistent with the basic principle that the creditor should be free to pursue all available remedies simultaneously, and in any event was as likely to discourage a creditor from proceeding against goods if there was land available as it was to discourage proceedings against land.

We are in substantial agreement with the observations made and the conclusions reached by the Ontario Commission.[232] We would adopt them, but with one qualification. In the case of the delay provision, we would recommend that the court have the discretion to enlarge or reduce the 6-month delay period on the application of any interested party, where the court considered it appropriate. Such an order might be granted on any terms that the court considered just. In the proper case, the court might eliminate the delay period altogether.

An order enlarging the time might be granted where the debtor established that there was some other exigible property that could be used to satisfy the debt with less disruption to the debtor's affairs. The court might also be moved to extend the time if the land would produce a crop in more than six months and the proceeds of that production could be used to satisfy the debt. An order reducing the time might be granted where it was clear that the debtor would not be able to refinance the land or where its value might deteriorate substantially if the sale did not proceed quickly.

We contemplate that a debtor who wished to bring application to establish that the land was exempt would be obliged to do so within this 6-month period.[233] If the creditor moved to shorten the 6-month period, the question of exemptions would have to be dealt with in the application before such an order could be given.

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[231] Such a disposition would be subject to the binding effect of the enforcement order unless made to a third party within the protection of the proviso.

[232] All the recommendations made by the Ontario Commission on the basis of these conclusions have been implemented in Ontario. Ontario Rules of Court, Rule 60.07.

RECOMMENDATION 58:

PROCEDURAL RESTRICTIONS ON ENFORCEMENT AGAINST LAND

The present requirement of a return *nulla bona* before sale of land in enforcement proceedings should be abandoned.

A requirement that the sheriff not sell the land before the expiry of a six-month period from the date of service of the notice of sale on all the parties upon whom service is required should be substituted for the present one-year delay.

The court should have a discretion to order the enlargement or reduction of this six-month delay where it considers it just to do so, and should also have a discretion to impose such terms as it considers just.

The present provision disentitling the creditor to costs of advertising land for sale, where the debt is satisfied by enforcement against goods and chattels, should be abandoned.

E. Method of Sale

The *Seizures Act* gives little direction on the mechanics of the execution sale of land. There is a suggestion in section 15 that there be notice given of the sale, by advertising or such other means as the court directs. It is clear that sale by auction is an acceptable procedure, but there is no indication whether or not other methods would be acceptable or could be ordered.

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[233] If the debtor's equity in the house was sufficiently large that by the terms of the exemption provision the sale would be conducted and the exempt equity reserved for the debtor, the debtor could apply to establish that entitlement, either before the sale or after receiving notice of the sale, during the confirmation delay period discussed below. Our recommendations concerning exemptions with regard to land are contained in Chapter 9, where we recommend that, in the context of land, the onus of establishing the exemption should be on the debtor.

In 1924, the masters in chambers issued a Practice Note concerning "Court Sales of Land"[234] that was intended to apply to both execution sales of land by a sheriff and judicial sales in mortgage proceedings. The note dealt mostly with the content of the advertisement of the sale, but it also contained reference to sales by tender as well as to sales by auction. At least in the case of mortgage sales, tender became the more commonly used method.

In 1984, Moir J.A. of the Alberta Court of Appeal criticized the continued use of the sale by tender method in judicial sales of land in mortgage proceedings.[235]

He found the experience of the Public Trustee to be instructive. The Public Trustee formerly used the tender method of sale when required to sell trust lands, but in recent years has found that "ads that once attracted many purchasers now attract not a single bid".[236] In many cases, the Public Trustee has adopted a new procedure:

> In Edmonton and Calgary he now obtains an appraisal of the property and then lists the property for sale at more than the appraised value, at least by the amount of the commission, with reputable real estate agents. Even in bad times he sells at more than the appraised value in most cases.[237]

After considering the deficiencies of the tender sale approach further, particularly in a depressed market, Moir J.A. concluded:

> If the property is large and the mortgage substantial it is apparent that some other method of sale (besides advertisement) should be tried. Real estate agents who are paid only if they sell are a real possibility if the court sees they have the proper information to promote a sale . . . . In my respectful opinion in depressed economic times the present method of sale is completely ineffective.[238]

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[234] Practice Note, *Court Sales of Land* [1924] 1 W.W.R. 273.

[235] *King Art*, *supra*, note 22.

[236] *Ibid.* at 601.

[237] *Ibid.*

[238] *Ibid.* at 603.

Laycraft J.A. made similar observations:

> The tender system is often not well-suited to the disposition of commercial properties or even of larger non-commercial properties. A property may have little value except in connection with some commercial venture for which it was designed. The sale of that venture will frequently be complex involving, for example, government licences or other permits. Where these or similar factors are important, it will often be desirable to list the property for sale rather than to invite tenders.
>
> Many factors, of which the above list is not intended to be exhaustive, will affect his decision. I would not shackle the master or judge by either specifying or forbidding any procedure for all the circumstances now existing or which may arise in the future but again would leave it to the common sense exercise of discretion.[239]

We believe that the same commonsense approach should apply to the sale of land in enforcement proceedings.[240] The need for a flexible approach to sale is heightened by our recommendation that all interests in land be exigible. The sale of some of the more unusual interests in land by a tender process would be frustrated completely by a lack of appropriate procedures. The recommendation that follows will, we think, provide the required flexibility for the method of sale.

We intend that the sheriff be authorized to enter into any kind of arrangement for the sale of the land that a commercially prudent vendor might. This would include accepting offers subject to conditions. We intend, as well, that the sheriff be authorized to retain any reasonable assistance that he requires to effect the sale, such as the services of solicitors, appraisers and real estate agents. It might also be necessary during the sale process for the sheriff to seek authority for such things as access to the property by potential purchasers for inspection, or access to information concerning the occupancy of rented portions of the property, or the terms of leases. It might be necessary for the sheriff to apply for an order permitting sale at whatever price can be obtained if, after reasonable effort, no buyer willing to pay a reasonable price has been found. The legislation should give the court jurisdiction to make such orders as are appropriate.

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[239] *Ibid.* at 648.

[240] In F.C.R. Price and M.J. Trussler, *Mortgage Actions in Alberta* (Calgary: Carswell, 1985), at 207, the listing agreement method is discussed. The discussion suggests that there are limits to the situations where it is appropriate, and in particular that it is of limited use, at least in the mortgage proceedings context, in the case of the single-family residence or condominium.

RECOMMENDATION 59:

METHOD OF SALE

A creditor who instructs the sheriff to issue a notice of sale in respect of land should suggest a method of sale to the sheriff. The sheriff should be at able to accept the creditor's suggestion or choose some other method of sale.

The notice of sale should describe the method of sale that the sheriff intends to use. Any party upon whom the notice of sale is served should be able to apply for an order requiring a particular method to be used if dissatisfied with the sheriff's choice.

If no such application is made during the 6-month delay period, the sheriff should be at liberty to use the method indicated in the notice of sale.

The court should have the power to make such orders as are required to facilitate the sale process.

F. Completion of Sale

Section 127 of the *Land Titles Act* provides that, once a purchaser has been found, the sheriff must apply to the court for an order confirming the sale. The application is made on notice to the debtor unless otherwise ordered. There is no direction in the section as to what the court is to look for at the time of this application. It does, however, provide an opportunity for the debtor to complain about any deficiency in the procedure or the price. The notice should also be served on all other parties who hold encumbrances on the property to be sold and on any other interested party.

We think that the debtor should have this last opportunity to object, but we think that it is sufficient if the process permits the debtor to make an application objecting to the sale if there is something that the debtor wishes to bring to the court's attention.[241] This is another situation where we believe that judicial intervention should be available but not compulsory.

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[241] Such as that the debtor is entitled to payment of the exempt portion of the proceeds if this has not been established previously.

On such an application, the court might be moved to intervene in the process if the debtor were to establish that some unreasonable prejudice had been suffered in the process, that the price was too low, or that the proposed terms of the sale were unreasonable.

We do not mean to suggest, however, that enforcement sale of land cannot proceed if a reasonable price cannot be obtained after reasonable effort. Such a situation should be dealt with in the same manner as in enforcement against personalty. If a reasonable price cannot be obtained after reasonable effort, the court should authorize the sheriff to sell at whatever price can be obtained.

RECOMMENDATION 60:

COMPLETION OF SALE

The present requirement of an order confirming sale should be replaced by a requirement that the sheriff, upon finding a purchaser, serve notice of that fact on the debtor, on the holders of other encumbrances on the title of the land to be sold, and on the instructing creditor. The notice should recite the terms of the sale.

Any interested party should have the right to apply within 14 days of receipt of service for judicial intervention in the procedure to prevent conclusion of the sale.

The court should order that the sale not be concluded if there has been any deficiency in the procedure that has prejudiced the debtor or any other interested party, if it considers that reasonable efforts to find a buyer have not been made, if it considers any other term of the proposed sale is unacceptable, or if it considers that any other circumstance justifies such an order.

On such an application, the court should give directions to the sheriff for the continuation of the sale process.

If no such application is commenced within 14 days, the sale should be deemed confirmed, the sheriff should be able to deliver a transfer or other closing documentation, and all interested parties should be estopped from making any application to challenge the sale.

G. Effect of Dower Rights on the Sale Process

Section 2 of the *Dower Act* prohibits the disposition of the "homestead" by a married person unless the spouse of that person consents. In *McNeil v. Martin and Peters,*[242] the Court of Appeal of Alberta held that an execution sale of a homestead is not a "disposition" as defined by the *Dower Act*, and accordingly can be made without the consent of the debtor's spouse. On such a sale, however, the purchaser acquires only the debtor's interest in the homestead — an interest subject to the spouse's contingent life interest established by the *Dower Act*. Accordingly, if the debtor dies before the spouse, the spouse will be entitled to possession of the property for the remainder of his or her life.[243]

Dean Bowker has observed that the western provinces derived their dower legislation from American "homestead laws".[244] He noted that, although the American models vary in detail, ". . . their usual features are: (1) the owner of the home cannot dispose of, or encumber, it without his spouse's consent; (2) the wife or family has the use of it after the owner's death; (3) it is exempt from sale under execution".[245]

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[242] *Supra*, note 191.

[243] In *McNeil, ibid.*, the Court of Appeal traced the history of the Alberta dower legislation, which was introduced in 1917. The act creates a contingent life interest in the homestead for the spouse of the owner. The contingency is that the life interest does not arise until the owner dies. The act, as it existed in 1922, was interpreted as permitting the owner to dispose of his or her interest without the consent of the spouse, but the purchaser would acquire the interest subject to the contingent life interest of the spouse.

In 1922, the Alberta Appellate Division held that an execution sale had the same result. The purchaser would acquire the debtor's interest, but it would be subject to the contingent life interest of the debtor's spouse. *Johnsen* v. *Johnsen* [1922] 2 W.W.R. 272.

In 1926, the act was amended to render it impossible for the owner to dispose of his or her interest without the consent of the spouse; however, according to the Court of Appeal in *McNeil*, the amendment does not have the same effect in respect of disposition by the sheriff in execution sales. The sheriff can effect a disposition without the consent of the spouse. The purchaser acquires the debtor's interest subject to the contingent life interest of the debtor's spouse. This interpretation has been applied for a considerable length of time apparently in the lower courts. See a case comment in (1966) 4 Alta. L. Rev. 506, which is incorrectly attributed to Dean Bowker by McDermid J.A. in the *McNeil* case at 327.

[244] W.F. Bowker, "Reform of the Law of Dower in Alberta" (1961) 1 Alta. L. Rev. 501.

Only the first two of these features has been incorporated into the Alberta *Dower Act*. It protects the non-owner spouse from disposition of the homestead by the owner spouse either during the life of or at the death of the owner spouse.[246]

The third common feature of American homestead legislation, exemption from sale under execution, has been incorporated into the *Exemptions Act*.[247] The *Dower Act* and *Exemptions Act* provisions, however, are poorly co-ordinated with each other. The differing descriptions of what each act protects are at the root of the problem.[248] In the *Dower Act*, "homestead" is defined as follows:

> (e) "homestead" means a parcel of land
>
> (i) on which the dwelling house occupied by the owner of the parcel as his residence is situated, and
>
> (ii) that consists of
>
> (A) not more than 4 adjoining lots in one block in a city, town or village as shown on a plan registered in the proper land titles office, or
>
> (B) not more than one quarter section of land other than land in a city, town or village.

The *Exemptions Act* description of exempt land is the same for rural land, but it is quite different in the case of urban land:

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[245] *Ibid*. at 502.

[246] *Dower Act*, ss 2, 18.

[247] Section 1(j), (k).

[248] A similar problem led to the repeal of "homestead" legislation enacted by the federal government for application in the territories. The *Homestead Exemption Act*, S.C. (1878) 41 Vict. C. 15. See W.F. Bowker, "Our Earliest 'Homestead' or 'Dower' Act" (1986) 24 Alta. L. Rev. 522.

> (j) the homestead of an execution debtor actually occupied by him, if it is not more than one quarter section, . . .
>
> (h) the house actually occupied by the execution debtor and the buildings used in connection with it, and the lot or lots on which the house and buildings are situated according to the registered plan thereof, if the value of the house, buildings and the lot or lots does not exceed $40,000 . . .[249]

The significance of the difference is that the "homestead" in which the non-owner spouse has a contingent life interest by virtue of the *Dower Act* might be worth more than $40,000. Where this is the case, although the *Exemptions Act* intends creditors to have access to that portion of the debtor's equity in the home that exceeds $40,000, the *Dower Act* makes that access subject to the non-owner spouse's contingent life interest. Practically, the effect is to make the home totally exempt, regardless of its value. As Belzil J.A. noted in his dissent in the *McNeil* case, "Who would buy this pig in a poke?"

We think that the unintended exemption created by the *Dower Act* should be abolished. Only that portion of the debtor's equity that has been intentionally rendered exempt should be exempt. We suggest that the *Dower Act* be amended so that it does not apply to, or affect, an enforcement sale of land. It should be made clear that the consent requirements of the *Dower Act* do not apply to an enforcement sale and that the non-owner spouse's contingent life interest in the homestead ends if the homestead is sold in an enforcement sale.

Under the present exemptions provisions, a debtor's house cannot be sold in execution if the debtor's equity is less than $40,000. In such a case, the non-owner spouse's dower rights are preserved. If the debtor's equity exceeds $40,000, however, and the property is sold with the exempt $40,000 being paid to the debtor, the non-owner spouse will not have a protected interest in that $40,000. We think that it would not be proper to address the question of whether or not the spouse should have a protected interest in that $40,000 in this report.[250] It is not a question of exemption from enforcement, it is a question of the extent of "dower" rights.[251]

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[249] If the debtor's equity in the home exceeds $40,000, the home will be sold and $40,000 will be paid out of the proceeds to the debtor before anything is distributed to the creditors.

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[250] We considered recommending that, where the debtor was married, the exempt $40,000 should be paid to the debtor and the debtor's spouse jointly; however, we thought that such a requirement would raise several procedural difficulties, such as providing a means of determining whether there was a spouse and who the spouse was. Moreover, the requirement would raise the more substantive difficulty that, if the spouses were not co-operating with each other, the fund would remain in a state of limbo and the purpose of the exemption — to ensure that the debtor has the means of providing a family shelter — would be frustrated. We concluded that it was the policies associated with dower rights that required reconsideration to determine whether and how these difficulties should be overcome. Such reconsideration is beyond the scope of this project.

[251] The *Dower Act* also creates a contingent dower life interest in goods and chattels. Section 1 defines "dower rights" as including "the right of the surviving spouse to a life estate in the personal property of the deceased married person that is exempt from seizure under execution. Section 23 says, "When a life estate in the homestead vests in the surviving spouse on the death of a married person, the surviving spouse also has a life estate in the personal property of the deceased that is declared in the *Exemptions Act* to be free from seizure under a writ of execution in his lifetime and the surviving spouse is entitled to the use and enjoyment of that personal property".

It is not clear if the dower right in personal property thus created arises only where there has been a vesting of a life estate in a homestead (which s. 23 suggests) or whenever there is such personal property in the estate (which the definition section might suggest). The proper interpretation is probably the former, since the definition refers to "the right", arguably meaning the right created by s. 23.

To the extent that the provision is meant to protect personal property from the deceased's creditors, it is superfluous to the provision of the *Exemptions Act*, which provides that exemptions survive the debtor and can be claimed by the spouse and children. We discuss that provision, and recommend an improvement to it, in Chapter 9.

The *Dower Act* provision, however, is likely intended to protect chattels from disposition by the debtor, and it makes sure that the surviving spouse gets them regardless of what the deceased spouse does with them. This effect is insignificant for creditors remedies.

The provision of the *Dower Act* that requires the spouse's consent to the disposition of the homestead does not apply to personal property, and

(continued...)

RECOMMENDATION 61:

DOWER CONSENT TO SHERIFF'S DISPOSITION

The consent of the debtor's spouse should not be required for an enforcement sale of a homestead.

The contingent life interest created by the *Dower Act* should not survive an enforcement sale.

H. Enforcement Against Joint Interests in Land

Joint tenancy is routine and commonplace in Alberta. Where two or more people own land in joint tenancy, each is entitled to simultaneous enjoyment of it. Each also has a right of survivorship.[252] If one joint tenant dies, the others automatically assume that person's interest in the property. It does not pass to the estate of the deceased joint tenant or to the beneficiaries under the will. It ceases to exist.

The interest of a debtor in land held jointly with other people is exigible.[253] The registration of the writ of execution on the title to jointly owned land does not effect a severance of the joint tenancy.[254] The sheriff can sell the debtor's interest, and the registration of the transfer from the sheriff ends the joint

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[251](...continued) there is not an equivalent provision that does. As it is only that provision that we are suggesting should not be applicable to the sheriff's sale, the chattels provision is irrelevant to this reform project.

[252] Survivorship is described in Halsbury's as follows:

> The death of one joint tenant creates no vacancy in the seisin or possession. His interest is extinguished. If there were only two joint tenants, the survivor is now seised or possessed of the whole. If there were more than two, the survivors continue to hold as joint tenants. This incident (called the *jus accrescendi*, for anyone who cares) is the most important feature of joint tenancy. [39 Halsbury's Laws of England, 4th ed., at para. 531]

[253] *Johnsen* v. *Johnsen*, *supra*, note 243; *McNeil* v. *Martin and Peters*, *supra*, note 191; *Westhill Leasing Corporation Ltd.* v. *Rideout*, *supra*, note 219.

[254] *Re Young* (1968) 70 D.L.R. (2d) 594 (B.C.C.A.); *McNeil* v. *Martin*, *ibid.*

tenancy, leaving the purchaser (or the debtor's joint tenant) to apply for partition, unless they are content to be tenants in common with each other.[255]

The exigibility of joint interests in land is consistent with the policy that all the debtor's property interests should be available to creditors, subject only to deliberate exemptions. The law should remain unaltered in this respect, but we suggest that there be an express provision to the effect that an enforcement debtor's interest in land, as a joint tenant, is exigible.

There has been considerable attention given to the effect of the joint tenancy principle of survivorship on the operation of the enforcement system. The enforcement process does not affect the operation of the survivorship rule until the land has been sold in an execution sale. It was held in Ontario, where the delivery of the writ of execution to the sheriff binds the goods and lands of the debtor, that delivery did not sever a joint tenancy.[256] Similarly, it was held in British Columbia, where land is bound by registration of the writ at the Land Titles Office, that registration did not sever the joint tenancy.[257] The principle upon which both decisions proceeded was that "a mere lien or charge on land, either by a co-tenant or by operation of law, is not sufficient to sever the joint tenancy; there must be something that amounts to an alienation of title".[258] It appears that only the sale of the land in execution would sever the joint tenancy. Consequently, if the debtor joint tenant dies before the land is sold in execution, his or her interest in the land ceases to exist and there is nothing for the writ of execution to bind.

We do not think that the registration and service of the notice of sale, which we propose as the first step in the enforcement against specific land, would sever a joint tenancy as the law stands at present. It would not amount to an alienation of title any more than would the registration of the writ on title.

The British Columbia,[259] Manitoba[260] and Ontario[261] law reform commissions have all recommended that the effects of survivorship in joint tenancy on the enforcement process should be modified by reform legislation. They consider the consequence of survivorship on enforcement an anomalous exception to the universal exigibility of interests in land. The British Columbia and Ontario commissions observed that if the debtor owns an interest in land in joint tenancy, the creditor, by registering the writ on title and waiting until it becomes a hindrance to a conveyance by the debtor, is subject to a risk not present in any other circumstance. The creditor would be frustrated by the death of the debtor.

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[255] On that application, the court will order that the land be divided between or among the co-owners, that the land be sold and the proceeds divided between or among the co-owners, or that one or more of the co-owners sell their interest to the remaining co-owner or co-owners: *Law of Property Act*, s. 15.

[256] *Power* v. *Grace* [1932] 2 D.L.R. 793 (Ont. C.A.).

[257] *Re Young, supra,* note 254.

[258] Widdifield, Co. Ct. J., in *Power v. Grace* [1932] 1 D.L.R. 801 at 802, approved by the Court of Appeal, *supra,* note 256 and quoted with approval in *Re Young, supra,* note 254 at 602.

[259] LRCBC Land, *supra,* note 213 at 22.

Professor Dunlop has written that the British Columbia law in this regard, which is the same as that of Alberta on this point, appears to be:

> . . . unjust when considered on the level of policy. In any case other than joint tenancy, the *Executions Act* permits a creditor to file a judgment in the land registry office and to take no further proceedings until the debtor either transfers his land or dies. In either case, assuming that the judgment has been properly filed and renewed, it attaches to the land in the hands of the purchaser or executor or administrator. If the land . . . had been held in tenancy in common, and the deceased debtor had left his interest in the land to the other tenant, the judgment would have travelled with the land . . . . As a matter of policy, it seems difficult to explain why the judgment creditor should be completely defeated in the situation where the debtor joint tenant predeceases his co-tenant. The creditor has taken the necessary steps to create a charge against the land of his judgment debtor but, in the case of land held in joint tenancy, the effectiveness of his charge turns on the complexities of the law governing severance of joint tenancy and on the accident of which joint tenant dies first.[262]

The British Columbia and Ontario commissions recommended that the judgment should continue to charge the land after the death of the debtor joint tenant, notwithstanding the operation of survivorship; however, the creditor could seek satisfaction of the debt out of the charged interest in land, only after looking

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[260](...continued)

[260] Manitoba Law Reform Commission, *Enforcement of Judgments: Part II: Exemptions Under The Judgments Act* (Winnipeg: MLRC, 1980) at 18 [hereinafter MLRC Part 2].

[261] OLRC Part 3, *supra*, note 212 at 23.

[262] C.R.B. Dunlop, *Execution Against Real Property in British Columbia* (1973), 8 U.B.C. Law Review 246 at 264.

to the estate of the debtor.[263] The British Columbia recommendation included details intended to ensure that the judgment creditor would not gain an unfair advantage over ordinary creditors in the distribution of the debtor's estate.

The Manitoba Commission[264] recommended that the joint tenancy be severed by the commencement of proceedings for enforcement sale of the debtor's interest in the land. The creditor would then have the means of eliminating the effects of the survivorship rule.

We do not agree that the present law in this regard is unjust and do not recommend any change. Although it is true that the enforcement creditor who has bound a joint tenant's interest in land is treated differently upon the death of a debtor than a creditor who has bound the interest of a tenant in common, we think that this is appropriate. The nature of the debtor's interest in land held in joint tenancy is significantly different to the debtor's interest in land held in tenancy in common. The joint tenant's right of survivorship is the significant difference.

We think that the comparison between the creditor of a joint tenant and the creditor of a debtor whose land is subject to a mortgage is more appropriate. The creditor of a debtor whose land is mortgaged can only bind the land subject to the property interest of a third party, the mortgagee. The title of the debtor is of a different nature than it would have been had there been no mortgage.

Similarly, the creditor of a debtor who owns a joint interest in land can only bind the land subject to the property interest of a third party, the other joint tenant. The binding effect is subsequent to and subject to the right of survivorship.

Since the death of a joint tenant extinguishes his or her interest, a joint tenant cannot be affected by dispositions of or claims against the estate of the deceased joint tenant. The three law reform commissions would alter this by making the joint tenant's interest subject to claims against the estate of the deceased joint tenant. This would be a fundamental change to the concept of joint tenancy.

Although we support fundamental changes where they will effect fundamental improvements, we do not think that this is such a case. Jointly held land is exigible. Creditors have access to it for the satisfaction of their claims in all circumstances except one — where the debtor dies. Even then, the creditor will not be prejudiced unless the debtor died without sufficient other assets to satisfy his or her creditors. We think that this exception is not of sufficient significance to justify a fundamental change to the law of joint tenancy.

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[263] Law Reform Commission of British Columbia, Working Paper No. 22, *The Enforcement of Judgments: Execution Against Land* (Vancouver: LRCBC, 1976) at 25; OLRC Part 3, *supra*, note 212 at 8-29.

[264] MLRC Part 2, *supra*, note 260 at 20.

The reformed legislation should provide that, where the debtor joint tenant dies and his or her interest in the land ceases to exist, the binding effect of the writ of enforcement on that land should be at an end.

RECOMMENDATION 62:

ENFORCEMENT AGAINST JOINT INTERESTS IN LAND

Legislation should make it clear that the interest of a debtor in land held as a joint tenant with another or others is exigible.

There should not be any change to the law regarding the effect of survivorship in joint tenancy on the binding effect of the writ. The binding effect should continue to be subject to the joint tenant's right of survivorship. If the debtor joint tenant dies, so that the debtor joint tenant's interest ceases to exist, the binding effect of the writ of enforcement on that land should be at an end.

I. Enforcement Against Unregistered Interests in Land

It is possible that a debtor could have an interest in land that has not been registered at the Land Titles Office. Where the land itself is registered under the *Land Titles Act*, the act contemplates enforcement against such an interest being initiated by the enforcement creditor causing a memorandum or caveat regarding the writ to be endorsed on the title to the land in which the debtor has an interest.[265] We think that the process we have proposed for enforcement against registered interests could be employed to complete an enforcement initiated in this manner. We do not think that a special procedure for realization on the interest in this situation is required.

Where a debtor owns an interest in land that is not patented, for example, a "disposition" in respect of public land under the *Public Lands Act*, the seizure of that interest is contemplated. Section 62 of the *Public Lands Act* provides:

> 62 When the interest of a holder of a disposition is seized in execution, no sale in execution of that interest is effective unless

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[265] *Land Titles Act*, s. 17.1(8).

> (a) it is made to a person who would be eligible to acquire it as an assignee from the holder, and
>
> (b) an assignment or transfer in favour of the purchaser is consented to by the Minister and registered under Part 5.

We have been advised by the Public Lands Office that there have been a few cases in which a seizure of such an interest was effected. The seizure was effected by the sheriff attaching a notice of seizure to the Public Lands Office file in respect of the disposition. That procedure has no statutory sanction, and apparently no enforcement efforts have ever proceeded beyond that stage.

We think that the situation does not arise frequently enough to justify special provisions to deal with it. A creditor who wishes to liquidate such interests can apply to the court for an order authorizing the sheriff to effect seizure by the manner that is used at present and giving directions for the disposition of the seized interest that will parallel that proposed for patented land.[266]

RECOMMENDATION 63:

ENFORCEMENT AGAINST UNREGISTERED INTERESTS IN LAND

The process proposed for enforcement against registered interests in land should apply as well to cases where the debtor holds an unregistered interest in registered land. Where the debtor owns an interest in unregistered land, the enforcement process should be left for determination of the court on application of the creditor wishing to enforce against it.

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[266] See *infra*, at 246.

CHAPTER 7
GARNISHMENT

A. The Garnishment Process — Issues for Reform

Garnishment of debts is probably the most effective and efficient of the existing creditors' remedies. The creditor's target is a debt owed by a third party (the "garnishee") to the judgment debtor. The technique is diversion, and the third party is required to pay the debt into court rather than to the debtor. The proceeds are then available for the satisfaction of judgment debts.

Its simplicity, efficiency and effectiveness make garnishment the procedure of choice for most creditors.

Garnishment is certainly less complicated and procedurally onerous than the seizure process.[267] Once the existence of a target is determined, documents are prepared, filed with the clerk of the court, and then served on the garnishee.[268] No letter of instruction to the sheriff or indemnity of the sheriff is required, and there is no visit by the bailiff to the place where the asset is held. No form is given to the debtor to facilitate initiation of an objection procedure, there is no sale process, and there is no "fire sale"[269] — the entire value of the asset is realized.

The popularity of garnishment was evident in our survey of enforcement activity undertaken in a sample of money judgments filed in 1980 and 1981. Garnishee summons were issued in about 35% of the cases where there was some enforcement activity. Seizures were instructed in about 20% of the cases.[270]

Money was paid into court in 38.5% of the judgments enforced by garnishee summons,[271] and although seizures occurred in about 42% of the cases where seizure was instructed, sales occurred in only 12.2%.[272]

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[267] Report for Discussion, *supra*, note 4 at 85.

[268] Rules 470, 471.

[269] Representatives of the sheriff's office have advised us that the "fire sale" character of execution sales has been grossly exaggerated. See Report for Discussion, *supra*, note 4 at 78.

[270] Research Paper, *supra*, note 3. Our sample included 2316 money judgments, and there was enforcement activity in 1964 of these. Garnishee summons were issued in 691 cases, and seizures were instructed in 409. In most of the remainder of the cases, the only "enforcement activity" was the filing of a writ of execution.

[271] *Ibid*. Table 37 at 150.

[272] *Ibid*. Table 27 at 121.

Given the efficiency and effectiveness of garnishment, the mechanics of the existing process are not in need of fundamental reform. There are, however, a few mechanical matters that we have considered and we discuss below.

The main reform issues in this area relate to the scope of application of the garnishment process. Several forms of asset that could be made subject to garnishment are not subject to it under the present law. Most of this chapter is given to a consideration of how the law might be reformed to expand the scope of the process. We recommend that the scope of garnishment be expanded to include the garnishment of joint debts, future obligations, conditional debts, and funds in court.

Although most of our attention has been given to expansion of the scope of the process, there is also a question of whether or not the scope of the process should be reduced by abolishing garnishment of wages. We have concluded that it should not.

B. Mechanics of the Garnishment Process

(1) Role of the Sheriff's Office

At present, seizure and garnishment processes are quite separate. The former requires a writ of execution and is carried out by instructions to the sheriff. The latter does not require a writ of execution and is carried out by instructions to the clerk of the court.

We recommended previously that no enforcement activity be permitted unless the creditor has delivered a writ of enforcement to the sheriff.[273] We consider this requirement to be important for the rationalization of existing remedies, the co-ordination of all enforcement activity, and the efficient implementation of the sharing principle for the distribution of enforcement proceeds. Accordingly, a creditor will be obliged to file a writ of enforcement with the sheriff before a garnishee summons can be issued.

We think that the logical implication of this requirement is that the garnishee summons should be issued from the sheriff's office and not the clerk's office. Moreover, in at least one of the new contexts where we propose that garnishment be available, garnishment of future or continuing entitlements, the process that we suggest involves regular communication between the supervising office and the garnishee. We think that this function can be performed best by the office that has primary responsibility for enforcement proceedings.

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[273] See Recommendation 7, *supra*, at 38.

RECOMMENDATION 64:

TRANSFER OF DUTIES FROM CLERK TO SHERIFF

The present functions of the clerk of the court relating to garnishment should be transferred to the sheriff.

(2) Rules of Court — Statute

In the Report for Discussion, we proposed that the present hodgepodge of statutory provisions relating to enforcement remedies should be brought together in one piece of legislation.[274] Most of the law relating to the garnishment procedure is contained at present in the Rules of Court.[275] This includes provisions that relate mainly to procedure and those that relate more to the substance of the remedy. There are also some procedural and substantive provisions in the ECA.

Notwithstanding that some of the provisions relate solely to procedure, we believe that to achieve an integrated, coherent and comprehensible description of the process, the provisions establishing it — both substantive and procedural, should be located in one place.

This place should be the statute relating to the enforcement of money judgments so that the description of the entire enforcement system might be integrated, coherent and comprehensible.

RECOMMENDATION 65:

TRANSFER OF PROVISIONS FROM THE RULES

The provisions establishing the garnishment process, both substantive and procedural, should be located in one statute — the same statute in which the provisions relating to the other enforcement processes are located.

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[274] Report for Discussion, *supra*, note 4 at 216.

[275] Rules 470-484.

(3) Requirement of an Affidavit

Under the present procedure, a judgment creditor may issue a garnishee summons, as of right, upon filing an affidavit establishing the necessary facts.[276] The Alberta procedure is different in this respect from that examined by the British Columbia and Ontario law reform commissions. In both jurisdictions, the process was discretionary — an application to the court was required.

Both commissions recommended abolishing the requirement that an application be made. British Columbia went further, however, and recommended that the requirement of the affidavit be abolished and that the "writ of immediate garnishment" be issued on demand,just as the writ of execution is issued on demand.[277] The British Columbia commission considered the benefits that accrue from the affidavit procedure to be marginal and the costs generated by the procedure to be unjustified.

The Ontario Commission recommended the retention of the affidavit requirement. They said:

> We are of the view that this requirement provides third parties with some protection against abuse of the garnishment remedy: the fact that the declaration must be made under oath is likely to deter the average judgment creditor from employing the remedy in a frivolous or vexatious manner.[278]

We agree with the conclusion of the Ontario commission.

RECOMMENDATION 66:

GARNISHMENT AS OF RIGHT — ON AFFIDAVIT

Garnishment should continue to be available as of right. The remedy should not be dependant on the discretion of the court, the sheriff or any other official.

The procedure, however, should continue to require the enforcement creditor to file an affidavit in which the facts required to exist before the process can be invoked are established on oath.

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[276] Rule 473(2), (3).

[277] LRCBC Attachment, *supra*, note 202 at 37.

[278] OLRC Part 2, *supra*, note 57 at 203.

(4) Objection Procedure

One significant difference between the present procedure relating to seizure and that relating to garnishment is that in the former there is an objection procedure that a debtor can invoke with little effort. When the seizure is effected, the debtor is served with a form entitled "Notice of Objection to Seizure" and a stamped envelope addressed to the sheriff. To initiate the objection procedure, the debtor needs only to sign and mail the form. The creditor cannot proceed to realize on the seized property without making application to the court, and the debtor's objection is heard and determined on that application.

There is no equivalent procedure in the garnishment process. The debtor is not even served with notice of the garnishment until after the garnishee has responded to the summons by paying money into court.[279] The debtor may apply to the court to have the garnishee summons set aside, or for a determination of any issue relating to the garnishment proceedings.[280] This contrasts with the objection procedure provided for seizure, where the debtor can raise an objection simply by mailing the notice of objection form to the sheriff.

We would not recommend that an objection process like that operating at present in the context of seizure be established for the garnishment process. But enforcement debtors should have a reasonable opportunity to bring before the court any objections they may have to garnishment proceedings. This requires, first, that enforcement debtors be provided with prompt notice that garnishment proceedings are under way. We propose, therefore, that a copy of the garnishee summons be served on the enforcement debtor after the garnishee responds to the summons, whether or not the garnishee pays any money to the sheriff. The enforcement debtor should also be served with the garnishee's response to the garnishment. Service of the response should be required even if the garnishee responds and states that there is no liability. It is in the interest of both the creditor and the debtor for the debtor to know the position taken by the garnishee.

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[279] Rule 471(3): "A copy of the garnishee summons shall be served on the defendant or judgment debtor or his solicitor not later than 20 days after payment into court".

[280] Rule 481(1) of the *Alberta Rules of Court* provides:

> Any person claiming to be interested in the money attached may apply to the court to set aside the garnishee summons or for an order for the speedy determination of any questions in the action or in the garnishee proceedings or for such other order as may be just.

Although the marginal note to this rule is, "Third person may apply", the debtor would certainly be a person claiming to be interested in the money attached (unless the debtor claims that the debt is owed to some other person). Interestingly enough, the predecessor rule, Rule 555(2) of the *Rules of the Supreme Court of Alberta,* began, "The defendant or judgment debtor or the garnishee or any person claiming . . .". One suspects that the reason for the elimination of the reference to the defendant or judgment debtor is that it was considered to be redundant.

In the draft statute that accompanies this report, we have included provisions that are intended to help communicate the fact of the garnishment and the garnishee's response to the enforcement debtor. The garnishee, in his or her return, will be required to state the last known address of the debtor unless obliged by law or contract with the debtor not to disclose it, in which case the obligation to advise the debtor of the garnishment will fall to the garnishee. Service of the garnishee summons and response on the debtor at this address should be sufficient.

RECOMMENDATION 67:

OBJECTION PROCEDURE

The enforcement debtor should be served with a copy of the garnishee summons and the garnishee's response.

The enforcement debtor should be given the right to apply to the court for the determination of any objection he or she might have to the garnishment.

The garnishee should be required to state the last known address of the enforcement debtor; or, if that is contrary to a legal or contractual obligation binding the garnishee, the garnishee should be required to give the enforcement debtor notice of the garnishment and of his or her response.

(5) Compensation for the Garnishee

Rule 477 provides that the garnishee paying money into court is entitled to deduct $5 from that amount for compensation. If he or she is not paying in all the money owed to the debtor, then he or she is to deduct the $5 from the fund that remains, and not from the fund that he or she pays in.

Given the increased burdens that the reforms we suggest will place on the garnishee, we believe that the present compensation provision is inadequate. We propose that the level of compensation be set from time to time by regulation and that it be maintained at a fair level. Determination of a reasonable level might be difficult, but we suggest that the starting point should be not less than $25 for each payment in made. Accordingly, if there were a continuing attachment of wages, the garnishee would be entitled to compensation of $25 each pay period. We do not think it appropriate for the amount of compensation to vary with the amount of the payment in. The burden on the garnishee is not related to the amount of the payment in.

RECOMMENDATION 68:

COMPENSATION FOR THE GARNISHEE

The garnishee should be entitled to compensation from each payment made in, or from the fund remaining in his or her hands if the entire indebtedness to the debtor is not required to be paid into court. The amount of the compensation should be established by regulation and should be maintained at a fair level. It should not be less than $25 per payment in.

C. Scope of Garnishment

Garnishment can be used to divert only "debts due or accruing due" to the judgment debtor.[281] The obligation owed by the third party to the debtor must a be "debt" — an obligation to pay a sum certain or a sum readily reducible to a certainty.[282] It must also be "due or accruing due" — unconditionally payable either immediately or at some future time.

The words "debt due or accruing due" have frequently precluded creditor access to potential sources of debt satisfaction. Three sources that are not within the scope of the process are of particular interest:

a) Joint Debts

The word "debt" in the governing Rule has been taken to require that the obligation be owed to the judgment debtor alone. Where the third-party obligation is owed to the judgment debtor and another jointly, the judgment debtor's interest in the obligation cannot be reached by garnishment. A joint bank account held by a judgment debtor and his or her spouse cannot be attached.[283]

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[281] Rule 471(1). "Service of the summons on the garnishee binds the debt, due or accruing due from the garnishee to the . . . judgment debtor . . .".

[282] Dunlop, *supra*, note 1 at 15-20.

b) Future "Debts"

Valuable future obligations, which, will come to be owed to the judgment debtor in the ordinary course of events, such as future wages and future rents, cannot be tapped by garnishment. They are not debts due or accruing due at the time of the service of the garnishee summons. A debtor can assign his future wages[284] or future rents to a creditor, but a creditor cannot obtain access to such future obligations without the debtor's co-operation.

A subset of future obligations are those subject to a contingency. Where the satisfaction of a contingency will give rise to an obligation on the part of a third party to pay the debtor, but there is no means of determining whether or not that contingency will ever be satisfied, the contingent "debt" cannot be attached. For example, if the debtor is the plaintiff in a damages action, the possible obligation owed to the debtor by the defendant cannot be diverted to the satisfaction of creditors while the contingency still exists. Obviously, such an obligation does not come within the definition of a "debt", and there is no certainty as to its amount or, for that matter, its existence.

c) Conditional Debts

Occasionally, courts are willing to interpret the scope of the process widely enough to catch a debt not payable until administrative and procedural conditions imposed by the garnishee have been satisfied, as long as doing so causes no prejudice to the garnishee.[285]

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[283] *Banff Park Savings & Credit Union Ltd.* v. *Rose and Bank of Nova Scotia* (1982) 22 Alta. L.R. (2d) 81 (Alta. C.A.) [hereinafter *Banff Park*]. The report is accompanied by a useful critical case comment by Professor Dunlop.

[284] A limit to the debtor's ability to assign his or her wages is imposed by the *Wage Assignments Act*, which declares that a wage assignment made by a debtor to secure the payment of existing or future indebtedness to a person who lends money in the ordinary course of business or operations (a "lending institution") is against public policy and void.

[285] *Bel-Fran Investments Ltd.* v. *Pantuity Holdings Ltd.* [1975] 6 W.W.R. 374 (B.C.S.C.) [hereinafter *Bel-Fran*], where a deposit was held attachable notwithstanding the bank's requirements for surrender of the non-negotiable and non-transferable deposit certificate. *Sandy* v. *Yukon Con-*

(continued...)

> No clear and reliable test exists, however, for determining whether or not a particular condition on payment will preclude attachment.[286]

A primary goal of this reform project is to give creditors access to all the sources of wealth from which a debtor might reasonably be expected to pay a debt. In the context of garnishment, it is necessary to consider whether creditors should be given access to sources of wealth at present beyond the scope of garnishment. Should the garnishment remedy be available to divert these kinds of assets to the benefit of creditors?

D. Garnishment of Joint Debts

A debtor's interest in a joint debt is absolutely immune from garnishment. The cases do not leave any room for doubt.[287] The reasons that courts have advanced for refusing to permit the garnishment of joint debts, including joint bank accounts, include the following:

i) Where money is due to two obligees[288] jointly, neither has any independent right against the obligor. To permit an enforcement creditor access to the fund would be to grant him or her a greater

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[285](...continued) *struction Co.* (1960) 33 W.W.R. 490 (Alta. C.A.), where a payment under a building contract was held to be "due" to the judgment debtor notwithstanding the provision in the contract that said it was not payable until the architect had issued a certificate to that effect.

[286] In *Provincial Treasurer of Alberta et al.* v. *Hutterian Brethren of Smoky Lake et al.* (1980) 12 Alta L.R. (2d) 368 (Alta. C.A.) [hereinafter *Hutterian Brethren*], an attempt to attach a term deposit failed because the creditor could not satisfy the bank's requirement that the non-negotiable and non-transferable deposit certificate be surrendered. The court was unwilling to permit the garnishee summons to "override provisions of a *bona fide* contract merely because it appears to the court that undue harm will not result from doing so". (per Prowse J. A. at 378).

[287] The leading case is *MacDonald* v. *Tacquah Gold Mines Ltd.* (1884) 13 Q.B.D. 535 (C.A.). It has been followed in England and Canada. In Alberta, the leading case is *Banff Park, supra,* note 283. In Ontario, there had been uncertainty, but it was recently removed in *Westcoast Commodities* v. *Chen* (1986) 55 O.R. (2d) 264.

[288] We use the term "obligee" to refer to the debtor and the party to whom, with the debtor, the debt sought to be attached is jointly payable. We hope this avoids the confusion that would result from referring to the debtor as a creditor in respect of the debt sought to be garnished. The term "obligor" is used to refer to the debtor's debtor, who upon the issuing of the garnishee summons can be referred to as the garnishee.

right in respect of the fund than is held by the enforcement debtor. It is a fundamental principle of the enforcement of debts that the creditor cannot obtain any greater rights over the debtor's property than the debtor has.

ii) It would be "contrary to justice" to permit a creditor to attach a debt due to two persons to answer the debt of one.

iii) There is no established procedure for the court to conduct an inquiry into the ownership of the debt.

iv) There might be other remedies available to the creditor against such an asset — in particular, equitable receivership.

We do not think that these reasons justify the exemption of jointly held debts from enforcement generally or garnishment in particular.

The invocation of the "fundamental" principle of enforcement of debts is inappropriate. Permitting creditor access to the debtor's interest in a joint debt does not grant any greater right than the debtor held. A joint estate in personalty is severable at the instance of either joint owner.[289] The enforcement debtor could sever the joint estate and pay his share to his creditors. Attachment of a joint debt, therefore, might be considered a forced severance of the joint interest. It is important, however, that the creditor have access only to the debtor's interest in the joint debt. Care must be taken to ensure that the non-debtor is not prejudiced by such access.

Creditor access to the non-debtor's interest would be "contrary to justice"; however, so would creditor exclusion from the debtor's interest. We think that both sources of injustice can be eliminated. In addition, we think that the absence of a procedure for determining the relative interests of the joint obligees can be remedied.[290]

As to the availability of alternative remedies, the application of the reasoning of the Alberta Court of Appeal in *Fox* v. *Peterson Livestock Ltd.*[291] could preclude an equitable receivership in the case of a joint bank account.[292] In any event, whether or not equitable receivership might be available, the question is whether there is any good reason for precluding access to the asset using the least expensive and most efficient remedy. Clearly, garnishment is less expensive and more efficient than equitable receivership.

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[289] 35 Halsbury's Laws of England (4th) at § 1145, note 5.

[290] It is arguable that there is already such a procedure: see Dunlop, Annotation to *Banff Park, supra*, note 283, where it is observed that Rule 481 contemplates an application to determine the interest of a third party in monies attached by garnishment.

[291] [1982] 2 W.W.R. 204.

These reasons therefore do not compel the conclusion that creditors should not have access to using garnishment to joint debts where only one of the joint obligees is an enforcement debtor. The joint debt is a source of wealth to which creditors should have access; it is a source from which a debtor might reasonably be expected to pay his creditors. It is necessary, however, that the legitimate interests of the other joint obligee be protected.

It should be noted that execution against an execution debtor's interest as joint tenant in real property has been permitted.[293]

RECOMMENDATION 69:

GARNISHMENT OF JOINT DEBTS

The scope of garnishment should extend to an enforcement debtor's interest in obligations due to the enforcement debtor and another, or others, jointly.

(1) Protection of the Joint Obligees

We agreed above that creditor access to the non-debtor joint obligee's (the joint obligee) interest would be "contrary to justice". The procedure that is adopted to permit access to the enforcement debtor's interest must protect the joint obligee from inappropriate trespass against his or her interest.

The view that the joint obligee should receive such protection is not universally held. It has been argued in the context of the joint bank account, where each account holder can make withdrawals without the participation of the other, that the non-debtor account holder might be thought to have submitted his or her share to the risk that it would be used to satisfy the other obligee's creditors. Where the terms of the account require the bank to honour cheques signed by either account holder, the debtor could write a cheque on the account and pay creditors notwithstanding that the other party had deposited the funds used for the payment. Garnishment would inflict no more injustice than the joint account holder had willingly assumed in entering the arrangement.[294]

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[292] Although it would not be necessary to do so, no receiver could be appointed in the *Fox* v. *Peterson Livestock Ltd., ibid.* because the "assets" sought to be made the subject of the receivership would not exist until a decision was taken to make a distribution of oil royalties. The court could not appoint a receiver to get over an impediment of that kind — the non-existence of the asset. The impediment was not in the nature of the debtor's interest in the asset. In the case of a joint bank account, however, it might be held that the impediment to attachment is the nature of the debtor's interest. Clearly, the asset exists.

[293] Dunlop, *supra*, note 1 at 180; see also Chapter 6 of this report.

The law governing joint debts, however, must apply to joint debts other than joint bank accounts. The risk that a joint bank account holder might typically assume in his or her contract with the bank relating to withdrawals from the account by the co-owner should not be forced on joint obligees in all contexts.

Even in the case of the joint bank account, it is significant that the typical terms of the account contract have evolved in an environment where the garnishment of joint debts was impossible. The joint-obligee might have insisted on restricted access to the account if the effect of granting unilateral authority to the debtor was to grant it to the debtor's creditors as well.

We conclude that the protection of the joint obligee is an essential aspect of the recommended extension of the scope of garnishment to joint obligations.

What form should this protection take? Other law reform agencies have recommended that, in the first instance, the garnishee would be required to pay the entire amount of the debt into court and that the joint obligee would be given the opportunity to establish to the court that a portion of the money paid was owned beneficially by him or her.[295]

We believe that such an approach constitutes an unreasonable interference with the rights and property of the third party and is likely to be too costly in judicial resources.

We prefer to start with the presumption that the interests of the various joint obligees are equal. Joint ownership of personalty, including debts, is the equivalent of joint ownership of realty. It "is distinguished by the four unities of possession, interest, title and time of commencement".[296] The practical implication of "unity of interest" is that the legal interests of the joint owners are equal. Accordingly, the procedure should require the garnishee to calculate the enforcement debtor's interest on the assumption that each joint owner has an equal interest and to pay that amount in response to the garnishee summons.

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[294] Dunlop, Annotation to *Banff Park*, *supra*, note 283.

[295] LRCBC Attachment, *supra*, note 202 at 49; OLRC Part 2, *supra*, note 57 at 142; *Tentative Recommendation Proposing the Enforcement of Judgments Law*, 15 Cal. L. Revision Comm'n Reports 2001 (1980) at 2331, 2554.

[296] 35 Halsbury's Laws of England (4th) at § 1144.

The procedure, however, must also be sensitive to the possibility that this presumption is wrong. An enforcement creditor who believes that the enforcement debtor's actual beneficial interest is greater than his or her presumed share should be able to apply before issuing a garnishee summons for an order requiring the garnishee to pay the greater sum.[297] Similarly, the debtor or the joint obligee should have the opportunity, after payment by the garnishee, to establish that all or a portion of the sum paid in was in fact beneficially owned by the joint obligee.

So that this protection of the joint debtor can be effective, it would be necessary to require the garnishee to give notice of the payment made in response to the garnishee summons to the joint obligee. That notice should include clear instructions to the joint obligee for the procedure to be followed if he or she objects. The objection period should be 30 days. In addition, no further garnishment of the same debt should be permitted within 30 days of the date of notice to the joint obligee, so that he or she can have an opportunity to make alternative arrangements for that portion of the debt presumed to belong to him or her.[298]

RECOMMENDATION 70:

PROTECTION OF THE JOINT OBLIGEES

Where a joint debt is the subject of garnishment, the garnishee should assume that the interests of the various joint obligees are equal, except where the garnishee is by order instructed otherwise.

Where the creditor establishes, on application, that the enforcement debtor is entitled to a greater portion of the joint debt, the garnishee should be ordered to pay the greater sum in response to the garnishee summons.

After payment by the garnishee, but before distribution of the money, either the enforcement debtor or the joint

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[297] As in the present practice, there might be situations where it is appropriate to bring this application *ex parte*.

[298] We considered proposing that the effect of the paying in of one debtor's interest be to automatically sever the joint ownership. This might seem appropriate to the theory of joint ownership — the unity of interest might be considered destroyed. We thought, however, that the practical difficulties that would be created for the garnishee — particularly in the case of banks — rendered this inappropriate.

obligee should have the opportunity to establish that the allocation of the joint debt between the joint obligees was inaccurate, and the court should make whatever order is required to correct the allocation.

The garnishee should be required to give notice of his or her payment to the joint obligee. The notice should include clear directions as to how the joint obligee can bring forward an objection.

There should be a prohibition of further garnishments of the same debt, except with leave of the court, until 30 days after the date of the notice to the joint obligee.

E. Attachment of Future Obligations

The words that limit the scope of garnishment, "debts due or accruing due", necessarily preclude the use of the remedy to divert to the benefit of creditors obligations that in the ordinary course will or might become payable to the debtor. Such obligations are not "debts due" or "debts accruing due", since that term includes only obligations that exist but are not yet payable, and excludes obligations that will arise only after some future performance by the debtor.

Furthermore, the impediment to the use of the garnishment remedy to divert future obligations cannot be removed by the court exercising its equitable jurisdiction to appoint a receiver. In *Holmes* v. *Millage,*[299] Lindley, L.J said:

> Unless a man has assigned or charged his future earnings or has made a sum payable out of them, they cannot be prospectively impounded by his creditors by any ordinary process of execution, whether legal or equitable. If the law in this respect is to be altered, it must be done by the legislature.[300]

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[299] [1893] 1 Q.B. 551 (C.A.) at 559.

[300] This limitation on the equitable jurisdiction has not been universally respected. Recent evidence of the court's frustration with the limitation and willingness to expand the scope of the equitable jurisdiction to permit receiverships of future obligations, in the spirit of the expanded equitable jurisdiction evidenced by the development of the Mareva injunction, can be seen in *Martin* v. *Martin* (1981) 123 D.L.R. (3rd) 719 (Ont. H.C.) and *Re Simon and Simon* (1984) 7 D.L.R. 128 (Ont. H.C.).

It has been a source of chronic frustration to judgment creditors that, to tap a debtor's earnings on a regular basis, they must issue a new garnishee summons immediately before each payday.

(1) Experience in Other Contexts

There have been several responses to this frustration. In the context of bankruptcy proceedings, it has been eliminated. The *Bankruptcy Act* permits the trustee to obtain an order requiring the bankrupt's employer to pay the non-exempt portion of the bankrupt's wages to the trustee in bankruptcy on a continuing basis.[301]

In 1977, the Alberta Legislature amended the *Domestic Relations Act* to provide a process for the continuing attachment of monies that become owing to a maintenance debtor after the date of service of the attachment notice.[302] The provision was continued in the enlightened legislation enacted in 1985 to improve the efficiency of collection of maintenance debts — the *Maintenance Enforcement Act*.

(2) Reform in Other Jurisdictions

The Law Reform Commission of British Columbia considered the attachment of future obligations in 1978 and recommended that, in limited circumstances, it should be possible for a creditor to issue a "writ of continuing garnishment" to attach debts that might come into existence within the term of the writ.[303] The recommendation has not as yet been implemented.

The Ontario Law Reform Commission recommended in 1981 that "all debts, those that are due and payable or payable at a future time and those that we have referred to as conditional, contingent or future debts, should be subject to garnishment."[304] This recommendation was implemented in amendments to the Ontario Rules of Civil Procedure, Rule 60.08(7) and (8), which provide:

> (7) The garnishee is liable to pay to the sheriff any debt of the garnishee to the debtor, up to the amount shown in the notice of garnishment, within ten days

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[301] *Bankruptcy Act*, R.S.C., c. B-3, s. 48. An exemption is determined by the court in ordering the payment to the trustee. It is only "such part of the salary, wages or other remuneration as the court may determine having regard to the family responsibilities and personal situation of the bankrupt" that can be affected by the order.

[302] *Domestic Relations Amendment Act, 1977*, S.A. 1977, c. 64, s. 6.

[303] LRCBC Attachment, *supra*, note 202 at 37.

[304] OLRC Part 2, *supra*, note 57 at 142.

> after service on the garnishee or ten days after the debt becomes payable, whichever is later.
>
> (8) For the purposes of subrule (7), a debt of the garnishee to the debtor includes a debt payable at the time the notice of garnishment is served and a debt,
>
> > (a) payable within six years after the notice is served; or
> >
> > (b) payable on the fulfilment of a term or condition within six years after the notice is served.

The federal Parliament has made the wages of federal civil servants subject to continuing attachment if such a remedy has been established in the province where the employee resides.[305]

The problem has received some consideration in Alberta. A private member's bill, introduced into the Alberta Legislature in 1984, would have amended section 5 of the ECA to provide for continuing attachment, but it was not passed.[306]

(3) Proposed Reform

We believe that the scope of the garnishment process should be enlarged to give creditors the ability to divert the debtor's future entitlements (which, from the garnishee's point of view, are future obligations). Where an enforcement debtor will become entitled to a receipt in the future, creditors should be able to ensure, in the present, that they will have access to that source of satisfaction when it comes into existence.

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[305] *Garnishment, Attachment and Pension Diversion Act*, R.S.C. 1985, c. G-2.

[306] Bill 253, 2nd Session 20th Leg. Alta., 1984. Section 5 of the ECA would have been amended by adding the following subsection:

> Where the first amount payable to the debtor that is bound by the garnishee summons does not satisfy the amount set out in the summons, the summons shall subsist and continue in force to bind the next and each subsequent amount that thereafter becomes due from the garnishee to the debtor, until such time as the total amount set out in the summons together with costs payable in respect of the summons under the Rules of Court, has been bound by the summons.

We believe, however, that there should be limits on this enlarged scope, and we discuss these below.

RECOMMENDATION 71:

ATTACHMENT OF FUTURE ENTITLEMENTS

Subject to the limitations described in the following recommendations, the scope of garnishment should be expanded to permit an enforcement creditor to attach future entitlements of the enforcement debtor.

(4) Limitation: Presently Existing Legal Relationship

At the time of the garnishment, there should be some certainty that the future obligation will come into existence. The remedy should not be used in hunting expeditions.[307] The British Columbia commission gives a good example:

> . . . a creditor, knowing that his judgment debtor is a logger (unemployed at present), may wish to take steps to secure a right to future wages. If that debtor had established a pattern of working, in season, for one particular employer, that might amount to a reasonable "connection" for the purposes of a writ of continuing garnishment.[308] The creditor might, however, wish to garnishee every employer in the forest industry in hope of reaching the one who finally employs him. This, we believe, should not be permitted. It would put all of those employers in the position of having to check their records periodically (perhaps as often as every pay period) to see if the debtor had been recently hired.[309]

Creditors should be obliged to establish that there is an existing legal relationship between the debtor and the proposed garnishee of such a nature as to give rise to a reasonable likelihood or possibility that a debt obligation will come into existence in the ordinary course.[310]

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[307] Or in fishing expeditions.

[308] We would not agree with this sentence. We feel that there must be an existing legal relationship — previous employment would not suffice.

[309] LRCBC Attachment, *supra*, note 202 at 38.

Where the relationship is one that both parties presently contemplate and intend will give rise to such an obligation, the remedy seems obviously appropriate. The law would be giving the creditor access to an asset that the debtor might reasonably have assigned to his or her creditors to satisfy debts.[311]

For example, the remedy should clearly be available where there is:

c. an existing employment relationship between the debtor and the proposed garnishee;[312]

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[310] The Law Reform Commission of British Columbia's recommendation is similar but not quite as restrictive:

> A writ of continuing garnishment may be issued only if
>
> a) there are facts or circumstances, or a relationship between the debtor and the garnishee whereby there are reasonable grounds for expecting that a debt due from the garnishee to the debtor may come into existence, and
>
> b) a writ of immediate garnishment would not be adequate having regard to the nature of the debt sought to be attached.

Under our recommendation, it is not sufficient that the relationship is of such a nature that a debt might reasonably be expected to arise under it. This would permit an enforcement creditor to issue a garnishee summons to any person who an enforcement debtor had on its customer list on the basis that out of such a relationship a debt could reasonably be expected to arise. We think that there should be a stronger relationship than that — it should be a relationship of legal significance at the time of the garnishee summons.

[311] Subject to the debtor's need to use some of the future revenue to maintain the revenue-producing asset. This point is considered further below in the context of exemptions from garnishment.

[312] In 1971, we recommended that all assignments of wages by debtors to their creditors be prohibited as being contrary to public policy: Institute of Law Research and Reform, Report No. 8, *Assignment of Wages* (Edmonton: ILRR, 1971). This was implemented in the *Wage Assignment Act*, with respect only to assignments to credit-granting institutions. We do not consider our present recommendation for the attachment of

(continued...)

d. an existing agreement by which the proposed garnishee will pay a commission to the debtor upon the debtor effecting a sale;

c. an existing lease under which rents will become payable to the debtor;

d. an existing mortgage, agreement for sale, or conditional sales agreement, under which payments will become due; and

e. an existing corporation by-law, which contemplates a dividend or bonus being declared in the future.

The remedy should not be limited to future debts arising out of an existing contractual relationship. It should also extend to future obligations that might reasonably arise out of a trust or other kind of fiduciary relationship between the proposed garnishee and the enforcement debtor. For example, the remedy that we recommend would apply to attach the kind of future obligation existing between the judgment debtor and the federal government in respect of which equitable receivership was denied in *Fox* v. *Peterson Livestock Ltd.*[313]

We do not suggest that the remedy should be limited to situations where the parties presently intend that their existing legal relationship will give rise to a future obligation. We consider it sufficient that there be a reasonable likelihood of such an obligation arising, regardless of the intentions of the parties.

Accordingly, the remedy should extend, as well, to entitlements arising out of the legal relationship between parties to a cause of action, whether or not an

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[312](...continued)
future wages to be inconsistent with our previous recommendation against wage assignments. We continue to believe that the assignment of future wages as security for a grant of credit is unacceptable; however, efficient access to the future wages of a defaulting debtor by judgment creditors is quite distinct from wage assignments given to obtain credit.

[313] *Supra*, note 291. Equitable receivership was sought in respect of a probable future distribution of oil royalties to be made to the members of an indian band of which the debtor was a member. The court held this not to be garnishable because no debt existed and the equitable remedy could not be invoked to remove such an impediment. It should be noted that there were other issues relating to the exemption of the asset, in respect of which the application was made under the provisions of the *Indian Act* (Canada). The court did not find it necessary to determine those issues. We do not suggest that those issues could be ignored in the application of the remedy that we propose to this situation. We suggest that this kind of future obligation should be susceptible to attachment if it is not exempt.

action has been commenced. So where the enforcement debtor has a cause of action, the creditors should be able to issue a garnishee summons to divert the potential recovery from the enforcement debtor to the satisfaction of the debts owed to them.[314]

In the draft legislation that accompanies this report, we considered it necessary to be specific as to the requirement of a currently existing legal relationship. "Currently existing legal relationship" might be considered too vague for statutory language. The remedy is available in situations where there is a legal relationship existing by reason of:

(a) a contract or trust,
(b) a cause of action,
(c) an employment relationship, or
(d) a statutory right, right to claim, or duty.

We propose that the procedure be that the enforcement creditor sets out in the affidavit filed in support of the garnishee summons facts that establish *prima facie* that such a relationship exists.

RECOMMENDATION 72:

LIMITATION — OBLIGATION ARISING FROM EXISTING LEGAL RELATIONSHIP

Attachment of future obligations should be limited to such entitlements as might reasonably be expected to arise out of a legal relationship existing between the enforcement debtor and the proposed garnishee at the time of the attachment.

(5) Duration of Attachment of Future Obligations

Both the British Columbia and Ontario commissions thought it necessary to put a limit on the duration of the effect of an attachment of a future obligation. They differed as to how long that duration should be. The British Columbia commission recommended that a "writ of continuing attachment" should be in force for one year subject to renewal for further periods of one year.[315] The Ontario commission thought that a fixed duration was necessary to protect the garnishee who, "if the notice were of unlimited duration, . . . might forget about it, and many years later pay the debt to the debtor in violation of the notice".[316] The Ontario commission thought, however, that the one-year duration proposed by the British Columbia commission was too short to permit the process to operate efficiently and effectively. Accordingly, it recommended that the duration be the same as that of the writ of execution — six years. The Ontario commission considered requiring that annual reminders of the continued existence of the garnishment be given to the garnishee, but rejected this possibility on the basis that it would "give rise to both legal and administrative difficulties".[317]

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[314] A receiver might be required to prosecute the litigation. See Chapter 8. The court might have to determine, if the debtor was not prepared to co-operate, whether or not the situation was one in which a receiver could carry on the litigation without the debtor's co-operation. The terms of the receivership might have to preserve some of the proceeds of the litigation to the debtor to secure his co-operation.

In the implementation of the Ontario commission's recommendations, the prospective effect of a garnishment was limited to debts payable within six years, or payable on the fulfilment of a term or condition within six years. The possibility of an extension of that period was not contemplated.[318]

The continuing attachment issued under the *Maintenance Enforcement Act* remains in effect for not more than three years from the date on which it is issued.[319]

Given that, by our recommendation, the attachment of future obligations would be limited to situations where there is an existing legal relationship between the enforcement debtor and the proposed garnishee, we considered recommending that the garnishment remain in effect as long as the relationship upon which it is based stays in effect, assuming that there continues to be outstanding writs of enforcement against the debtor throughout that period. We thought that risk that a garnishee might forget that a future obligation not payable for many years had been the subject of a garnishee summons could be avoided by requiring the creditor to serve annual reminders on the garnishee.

When we came to work out the details of this recommendation, however, the result seemed to be too complicated to be worthwhile. We have concluded that it would be preferable to provide that the garnishee summons should expire one year after being served on the garnishee, unless it is renewed by the original creditor or another creditor of the same debtor. Renewal of the garnishment would be accomplished by serving a replacement garnishee summons on the garnishee. No new affidavit would be required to support the renewal. The replacement summons would bring the garnishee up-to-date on the amount owing under the garnishee summons.

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[315] LRCBC Attachment, *supra*, note 202 at 47: recommendations 20, 21. The report assumes the need for an expressed limit on the duration. The only issue addressed is the length of the duration.

[316] OLRC Part 2, *supra*, note 57 at 212.

[317] *Ibid*. at 213.

[318] Ontario Rules of Civil Procedure, r. 60.08(8).

[319] Alberta Regulation 2/86, s. 16.

RECOMMENDATION 73:

DURATION OF GARNISHMENT

A garnishment of a future obligation should expire one year after the date it is served on the garnishee unless a renewal summons is issued and served before the end of the year.

(6) Adjustment of the Amount Bound by the Garnishment

Elsewhere in this report, we recommend the continuation of the sharing principle as the foundation of the system for distribution of the proceeds of enforcement activity.[320] Accordingly, we also recommend that all enforcement activity continue to be undertaken for the benefit of all enforcement creditors of the same enforcement debtor. Therefore, the amount attached by the garnishee summons will be the total amount owing on subsisting writs of enforcement at the time the garnishee summons is issued.

It could be that the total amount owing on writs of enforcement filed with the sheriff will change. Other creditors of the debtor might file writs of enforcement and thus increase the total amount owing. Other enforcement activity might produce funds to reduce the balance owing. The garnishment procedure should contemplate altering the amount attached by the garnishee summons if the amount owing on writs of enforcement changes. We suggest that there be three means by which such an adjustment could be effected.

We proposed previously that annual renewal summons be sent to the garnishee if the creditor wishes to keep the summons alive. These would provide a means of adjusting the amount due under the garnishment to reflect changes in the amount due under writs of enforcement subsisting with the sheriff.

A second means of adjusting the amount bound by the garnishee would be provided by the system of statements sent by the sheriff to the garnishee after receipt of a payment. This would be used where the payment did not end the legal relationship and further future debts were bound. The sheriff would send a statement to the garnishee, upon receipt of a payment from him or her, acknowledging receipt of the payment and setting out the current balance outstanding on writs of enforcement against the debtor after application of the payment.

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[320] See Recommendation 135, *infra*, at 334.

A third means of adjusting the amount bound by the garnishment would be required when a new writ of enforcement was filed. If the garnishment was producing regular payments to the sheriff, the adjustment would be made to the balance owing on the next statement issued by the sheriff upon receipt of a payment. But if the attached future obligation was not of that kind, if it was, for example, a one-time future obligation, the new enforcement creditor should be able to require that the sheriff send a notice to the garnishee advising of the increase in the amount bound by the garnishment.

RECOMMENDATION 74:

ADJUSTMENT OF AMOUNT BOUND BY THE GARNISHMENT

The amount attached by the garnishee summons should increase or decrease with the total amount owing on writs of enforcement against the debtor filed with the sheriff.

An enforcement creditor who files a new writ of enforcement should not be able to issue a new garnishee summons to a garnishee already subject to a garnishee summons.

The procedure should ensure that any changes in the total amount owing under writs of enforcement filed with the sheriff are communicated to the garnishee and that the amount bound by the garnishee summons is adjusted accordingly.

(7) Deposit Accounts

The Law Reform Commission of British Columbia did not believe that a "writ of continuing garnishment" should be used to attach a bank account. Their reasons related to the preservation of the "immediate garnishment" as a process distinct from the "continuing garnishment".[321]

The requirement of a currently existing legal relationship makes the remedy we propose more restrictive than the one proposed by the British

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[321] LRCBC Attachment, *supra*, note 202 at 37.

Columbia commission. We see no need to restrict attachments of future obligations to situations where there is no present obligation that can be attached.

Nevertheless, we have come to the same conclusion as the British Columbia commission with regard to the future attachment of bank deposits, but for a different reason. We recognize the significant and unreasonable administrative burden that would be placed on banks and other deposit institutions if deposit accounts were susceptible to future attachment. If the debtor deposited funds into an account that had been emptied by a garnishment but not closed, the bank would continue to be obliged to comply with the garnishment whenever there was a credit balance in the account. The practical course would be to close the account whenever it was emptied by a garnishment. We do not think it reasonable to impose that administrative burden on deposit institutions.

RECOMMENDATION 75:

DEPOSIT ACCOUNTS

Deposit accounts should not be susceptible to garnishment except in respect of the balance held in the account at the time of service of the garnishment.

(8) Personal Compensation Entitlements

We have considered whether or not claims for personal injury damages should be susceptible to the garnishment process.

It might be argued that a cause of action for personal injury damages exists so that the debtor can be restored to the position he or she was in before a tortious wrong was committed. It might seem contrary to legal principle that such litigation should be conducted not for the purpose of restoring the debtor but rather for the purpose of satisfying the debtor's creditors. We note that in bankruptcy a debtor's entitlement to damages for personal injury does not vest in the trustee in bankruptcy, and accordingly is not distributed among the creditors.[322]

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[322] The reason is well expressed by Denman J in *Rogers* v. *Spence* (1844), 153 E.R. 239:

> ...as the object of the [bankruptcy] law is manifestly to benefit creditors, by making all the pecuniary means and property of the bankrupt available to their payment, it has, in furtherance of this object, been construed largely, so to pass, not only what in strictness may be called the property and debts of

(continued...)

The holder of a cause of action for damages for personal injuries, however, can assign the damages that might be recovered in the action.[323] Accordingly, we believe that it is appropriate that his or her creditors have access to this form of entitlement, including the proceeds of any settlement of the debtor's cause of action. Often a personal injury damages award will include compensation for loss of future earnings, which if they had been earned would clearly have been a legitimate target for creditor enforcement efforts. Moreover, once the cause of action is reduced to a judgment, the judgment debt would be garnishable by the plaintiff's creditors. If a debtor's financial circumstances are severe enough to render it inappropriate that his or her creditors should have access to the benefit of a personal injury award to which he or she is entitled, the debtor can, and probably should, invoke the bankruptcy system.

The Law Reform Commission of British Columbia expressly contemplates personal injury entitlements being the subject of attachment.[324] Although the Ontario Law Reform Commission did not address the matter directly, its recommendation was limited to the attachment of conditional, contingent or future debts. The term "debts" usually excludes damages; however, the rule implementing the commission's recommendation[325] contemplates the attachment of debts that become payable within six years after service of the notice of garnishment. If a personal injury defendant were served, presumably any judgment for damages entered within six years would be a debt caught by the notice.

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[322](...continued)

> the bankrupt, but also those rights of action to which he was entitled for the purposes of recovering, in specie, real or personal property, or damages in respect of that which has been unlawfully diminished in value, withheld, or taken from him; but causes of action not falling within this description, but arising out of a wrong personal to the bankrupt, for which he would be entitled to remedy whether his property were diminished or impaired or not, are clearly not within the letter, and have never been held to be within the spirit, of the enactments, even in cases where injuries of this kind may have been accompanied or followed by loss of property.

[323] *Glegg v. Bromley* [1912] 3 K.B. 474.

[324] LRCBC Attachment, *supra*, note 202 at 48, 52.

[325] Ontario Rules of Civil Procedure, r. 60.08(8).

RECOMMENDATION 76:

PERSONAL COMPENSATION ENTITLEMENTS

An enforcement debtor's possible future entitlement arising out of a cause of action for damages for personal injury or other damages, including the proceeds of a settlement of the cause of action, should be subject to attachment.

(9) Discretionary Partial *Exemption*

It is necessary to limit the potential scope of this expanded garnishment remedy in one further respect. A substantial injustice could result if an enforcement creditor is able to divert the debtor's entire cash flow to the satisfaction of judgment debts. In many cases, the debtor will need at least a portion of the attached entitlement to pay expenses associated with the production of the income that has been attached. In such cases, a portion of the obligation should be exempt from attachment and available for that purpose.

The present law recognizes the principle in the context of the attachment of wages. The Rules of Court provide for an exemption for a portion of attached wages.[326] The present law does not provide for a similar exemption in any other circumstance. The extent of the injustice that results is probably not great, however, because only one payment can be attached at a time. The debtor can make other arrangements for meeting future expenses associated with the production of the income before the creditor can issue a subsequent attachment.

The process that we recommend, however, would permit the attachment of future payments as well, and the debtor would not be able to make such alternative arrangements. The British Columbia commission cites a good example of the problem:

> D bought a house from M, giving a small down payment and a mortgage back to M for the balance. D's mortgage payments are $350 per month. D then leases the house to G for $400 per month. C obtains a judgment against D and issues a writ of continuing garnishment against G with respect to the rent.
>
> While it may be acceptable to permit C to take execution proceedings against D's interest in the house itself we have some reservations about allowing C to totally choke D's "cash flow" through garnishment. If

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[326] Rule 474.

> this causes M to start foreclosure proceedings, both D and G may suffer unnecessarily and if D loses the house, C may ultimately suffer as well.[327]

The British Columbia commission considered it impossible to provide for every conceivable hard case of this nature and recommended that the court be given discretion to vary the garnishment process.[328] We agree. There does not seem to us to be any practical way of dealing with this problem other than giving the court power to order that a portion of the attached obligation be exempted to ensure that expenses associated with the production of the obligation are paid.

The court's power ought to extend to ordering whatever arrangements are considered necessary to ensure that the exempted portion of the attached obligation is in fact used for the defraying of such expenses. A variety of orders should be possible. The court should, for example, be able to order an exemption; to appoint an assessor to determine the proper amount of an exemption; to appoint a receiver/manager to administer the payment of the expenses; or to make a summary order saying that a certain sum will be paid to the sheriff in each period by the garnishee where the amounts involved do not justify a more precise determination.

We do not believe, however, that this discretionary exemption should be available to exempt a portion of an attached debt that is payable when the garnishee summons is served. An exemption of this kind, in that situation, would amount to an unwarranted preference for one creditor over another.

RECOMMENDATION 77:

DISCRETIONARY EXEMPTION

Where an enforcement creditor issues a garnishee summons against a future obligation, the court, on the application of the enforcement debtor, should have the discretion to exempt such portion of the obligation from attachment as the enforcement debtor can establish is required to pay expenses that were, or will necessarily be, incurred for the enforcement debtor to maintain the future obligation.

The court should have the discretion to impose such terms as are necessary to ensure that the exempted

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[327] LRCBC Attachment, *supra*, note 202 at 48.

[328] *Ibid*.

portion of the obligation is used for the purpose for which it is required.

The discretion should not permit the exemption of a portion of a debt that is payable to the enforcement debtor at the time of the service of the garnishee summons.

(10) Responses by the Garnishee to Attachment of Future Obligations

Under the present Alberta rules, when a garnishee summons is served the garnishee must respond within 10 days by paying the sum attached by the summons into court; disputing liability to the enforcement debtor; disputing the attachability of the debt; advising that a sum is accruing due, but is not yet due; or advising that the sum attached belongs or might belong to a third person.[329] We think that a similar requirement should be imposed under the expanded garnishment remedy.

At present, a garnishee who acknowledges a debt that is accruing due, but is not yet payable, must pay the appropriate sum into court when the debt becomes payable.[330] The same procedure can be applied to the expanded garnishment process. For example, if the present and future wages of the debtor were attached, the garnishee would respond by paying the attachable portion of the present wages to the sheriff and acknowledging that the wages payable for the next and subsequent pay periods were bound and that the attachable portion would be paid when due.

Let us suppose that the garnishee denies that there is a relationship that could give rise to the future obligation against which a garnishee summons is aimed. This is analogous to the situation under the present procedure where the garnishee denies liability to the execution debtor or claims that the debt is not attachable. In this situation, Rule 476(1) requires the garnishee to state the grounds for the denial of liability or the claim that the debt is not attachable. We believe that a similar requirement should be imposed on a garnishee who denies the existence of the legal relationship that forms the basis of the garnishment proceedings. That is, the garnishee should be required to file a statement denying the relationship asserted by the enforcement creditor.

If the garnishee files a statement denying the existence of a relationship that could create a future obligation, the next question is what the effect of this denial should be. One possibility is a rule that if the garnishee files such a denial, the enforcement creditor must promptly challenge it or lose the benefit of the garnishee summons. It could be provided, for example, that the garnishee summons automatically lapses unless the enforcement creditor makes an application to the court within 14 days of the filing of the garnishee's denial.

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[329] Rule 475.

[330] Rule 475(1)(a)(c).

We think, however, that such a rule would be unhelpful. One of its likely effects would be to encourage garnishees to file groundless denials. It also would require enforcement creditors to take up valuable court time with applications to determine whether there is a relationship between a garnishee and an enforcement debtor under which the former *might* at some future time be required to pay money to the latter. The courts have enough to do without requiring enforcement creditors to make applications that, if resolved in their favour, will establish only that the garnishee *might* later be under an obligation to pay money to the enforcement debtor. Often, it will be more efficient to delay any application until the court can be asked to determine the concrete issue of whether or not the garnishee *is* under an obligation to pay. Indeed, adopting a "wait and see" approach will often make any application unnecessary, because the answer will become self-evident.[331]

It should be apparent that we intend that a garnishee summons issued against a future obligation will remain in effect even if the garnishee denies the existence of the relationship upon which the garnishment proceedings are founded. Thus, if, much to the garnishee's apparent surprise, the obligation at which the garnishee summons is aimed does eventually become payable, the garnishee will be required to pay the appropriate amount to the sheriff. If nothing ever becomes payable, then the question of whether the garnishee summons is still in effect is largely academic. That the garnishee summons remains in effect despite the garnishee's denials should be brought home to the garnishee by appropriate wording in the summons.

Undoubtedly, there will be situations where an enforcement creditor or garnishee wants the court to determine whether there is an existing relationship that could later impose on the garnishee an obligation to pay money to the enforcement debtor. The creditor or garnishee might not be content to adopt a "wait and see" approach. We would not preclude the creditor or garnishee from applying without delay to have the issue of whether or not the required relationship exists determined by the court. In effect, the applicant would be seeking a declaration: a declaration about the existence or non-existence of a relationship that could give rise to a future obligation. Declarations are discretionary forms of relief. If the court is not satisfied that any real purpose will be served by dealing with the issue before it has assumed a more concrete form, the court might well exercise its discretion by declining to do so.

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[331] A good example is where the enforcement creditor's garnishee summons is based on a cause of action that the enforcement debtor is alleged to have against the garnishee. If the enforcement debtor has commenced an action, the outcome of the action will determine whether the garnishee summons actually attaches anything. There should be no need for a separate application in the garnishee proceedings to determine this issue.

From the foregoing, it can be gathered that the purpose of requiring a garnishee to file a "denial" statement is fairly modest. The denial will inform the enforcement creditor that the garnishee has received the garnishee summons, and that the garnishee does not acknowledge the relationship alleged in the summons. If nothing else, this may tell the enforcement creditor that it is necessary to look elsewhere for satisfaction of the judgment debt. If the enforcement creditor is not content to take the garnishee's denial at face value, the denial will at least warn the creditor to pay close attention to subsequent dealings between the enforcement debtor and the garnishee.

RECOMMENDATION 88:

RESPONSE BY THE GARNISHEE

In the case of garnishment of a future obligation, the garnishee should be required to file a response to the garnishee summons that either acknowledges or denies the existence of the legal relationship upon which the garnishment is founded.

A garnishee who acknowledges the legal relationship should state when it is expected that the future entitlement will become payable and the nature of the contingencies affecting the future entitlement.

Where a renewal garnishee summons is served, a new response should be required from the garnishee.

The garnishee summons should make it clear to a garnishee who denies the existence of the legal relationship that the garnishee summons remains in force, notwithstanding the denial.

(11) Failure of the Garnishee to Respond

The present Rules provide that if a garnishee does not respond to a garnishee summons, the enforcement creditor can apply for judgment against the garnishee.[332] In applying this rule, the court has restricted the right of the enforcement creditor to judgment for the amount that the garnishee establishes would have been paid into court had he or she responded properly to the summons.[333] On the application, the failure of the garnishee to respond to the summons gives rise to a presumption that the garnishee was indebted to the debtor for the full amount claimed in the garnishee summons. The onus is on the garnishee to establish that the debt was for a lesser amount.

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[332] Rule 475(4).

The same procedure is appropriate to the expanded garnishment process when the garnishee makes no response when the garnishee summons is initially served, does not file a statement as to the status of a contingency affecting the future entitlement, or does not make payment to the sheriff when the entitlement arises. The enforcement creditor should be able to apply for judgment in any of those situations. If the garnishee appears and establishes that the entitlement has not yet come into existence, the application will be dismissed. Since the application in such a case will have been necessitated by the failure of the garnishee to file the response required, the garnishee should be ordered to pay the enforcement creditor's application costs. The level of costs available should be sufficient to encourage the garnishee to file the response required and to avoid the application.

RECOMMENDATION 79:

SANCTION FOR GARNISHEE'S FAILURE TO RESPOND

If a garnishee fails to file any of the responses that he or she is required to file after the service of the garnishee summons or during the currency of the garnishment, the enforcement creditor should be able to apply for judgment against the garnishee.

On the application, the failure of the garnishee to respond to the summons should give rise to a rebuttable presumption that the garnishee is indebted to the debtor for the full amount claimed in the garnishee summons.

The garnishee should not be estopped from raising in answer to such an application anything that might have been stated in a required response, and no judgment

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[333] *Hudson's Bay Company* v. *B.D.C. Ltd.* (1977) 3 Alta. L.R. (2d) 375 (Alta. D.C.). When the garnishee appears on the application and establishes that he or she was liable to the debtor for a sum less than the amount owed to the creditor, judgment will be awarded for the sum that should have paid in, not for the full amount of the creditor's claim. If the garnishee does not appear, judgment will be granted for the full amount.

> **should be awarded against the garnishee except for the amount that would have been payable to the sheriff under the garnishee summons had the garnishee complied with the procedural requirements.**
>
> **If the application would have been unnecessary had the garnishee complied with the procedural requirements, costs of the application should be awarded against the garnishee notwithstanding that the enforcement creditor is not granted judgment.**
>
> **The level of costs should be high enough to encourage garnishees to file the answers required by the procedure.**

(12) Garnishee's Set-Offs

The Law Reform Commission of British Columbia identified a possible injustice to the garnishee that could occur in cases of attachment of future obligations.[334] Under the present law, the creditor can attach no more than the debtor has. Any defence that the garnishee might raise against the debtor, he or she can raise against the garnisheeing creditor. This would include any right of set-off existing at the time of the garnishment.

It has been held, however, that the garnishee cannot raise a set-off that accrues to him between the date of the attachment and the payment to the clerk. In *Tapp* v. *Jones*,[335] Blackburn J. said:

> It is obviously just that if a cross debt were due to the garnishee at the date of the attachment there should be a right of set-off in his favour, and I should strive hard to give effect to it if I could, though there would be difficulties in the way. But Mr. Williams goes further, and maintains the right to set off debts accruing after the attachment. For this I see no ground. On the attachment the thing is absolutely fixed; and there is no clause of mutual credit or set-off. What would have been wise or just I do not say; but the legislature has certainly said no such thing as that contended for.

The potential injustice to the garnishee if he or she is denied any right of set-off accruing between the date of attachment of a future entitlement and the date that it becomes payable is sufficiently great to require attention. At the same time, however, it is recognized that the right to claim the benefit of a set-off accruing after service of the garnishee summons provides an invitation to garnishees and enforcement debtors to collude to the prejudice of enforcement creditors.

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[334] LRCBC Attachment, *supra*, note 202 at 50.

[335] (1875) 10 L.R.Q.B. 591 at 593.

The British Columbia Commission recommended that a garnishee should not be able to rely on a set-off arising after service of a continuing garnishment unless the set-off arose pursuant to a binding commitment entered into before service of the garnishment, or unless "the garnishee behaved reasonably in all the circumstances and it would be inequitable to deny him the right to rely on or asset" the set-off.[336] We believe that the Commission's recommendations in this regard provide the appropriate balance and we have adopted them in the following recommendation.

We can see no reason to limit the operation of this recommendation to garnishments of future obligations. The enlargement of the scope of garnishment makes the need for this reform greater; but the situation is unjust in principle, regardless of whether the attached entitlement is present or future. Provisions to this effect have been enacted in New Brunswick[337] and in Prince Edward Island.[338]

The Ontario commission noted a curious rule applicable in this context. There is authority that a garnishee can only raise a set-off that existed at the time of the garnishment if the amount of the garnishee's counter-claim exceeds the debt sought to be attached.[339] The commission could see no justification for this restriction and recommended that it be abolished. We agree.

RECOMMENDATION 80:

GARNISHEE SET-OFFS

A garnishee should be able to raise any set-off against the enforcement debtor that exists at the time of the garnishment.

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[336] LRCBC Attachment, *supra*, note 202 at 51.

[337] *The Garnishee Act*, R.S.N.B. 1973, c. G-2, s. 11. This provision goes further. It permits the garnishee to rely on any defence that the debtor might have raised against the attaching creditor.

[338] *The Garnishee Act*, R.S.P.E.I. 1974, c. G-2, s. 15.

[339] OLRC Part 2, *supra*, note 57 at 213, citing *Hale* v. *Victoria Plumbing Co.* [1966] 2 Q.B. 746 (C.A.), [1966] 1 All E.R. 672.

A set-off arising after service of a garnishee summons, however, should not be effective as a response to the garnishment unless the garnishee establishes:

a) that the set-off arose pursuant to a binding commitment entered into before service of the garnishment, or

b) that it would be inequitable to deny the set-off.

(13) Attachment of an Insured Claim

A complication might arise where the garnishee carries insurance coverage in respect of the claim that the enforcement debtor has made against him or her, and which the enforcement creditor has attached as a future entitlement. For example, where the enforcement debtor has a cause of action for personal injury damages against the garnishee and the garnishee has insurance for that potential liability, should the enforcement creditor have direct access, perhaps by route of a second garnishment, to the insurance proceeds? If so, should the garnishee continue to be bound by the original garnishment? If the insurer does not honour the garnishment, but pays the insurance proceeds to the enforcement debtor, should the original garnishee be liable to the enforcement creditor?

The Law Reform Commission of British Columbia recommended that, in such a situation, the enforcement creditor be able to serve the garnishment on the garnishee's insurer and to attach the insurance proceeds that might become payable to the enforcement debtor.[340] The commission also recommended that, where an insurer has been served with a garnishee summons and fails to comply, but rather pays the insurance to the enforcement debtor, this should not "constitute non-compliance with the garnishment process by the insured person".[341] The garnishee would in effect be discharged from any obligation under the original garnishee summons. The enforcement creditor might have a claim against the insurer for failure to comply with the second garnishment, but would not have one against the insured garnishee.

We do not favour this approach. The recommended fundamental precondition for the attachment of a future entitlement, a currently existing legal relationship between the enforcement debtor and the garnishee (the insurer), is not satisfied. When the proceedings between the enforcement debtor and the garnishee are in progress, the enforcement debtor has no legal relationship with the insurer, by contract, statute or anything else.

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[340] LRCBC Attachment, *supra*, note 202 at 52.

[341] *Ibid*.

The earliest that the enforcement debtor obtains any cause of action against the insurer is when he or she obtains judgment against the garnishee,[342] and then only if the claim is made under a motor vehicle liability policy. If any other kind of insurance is involved, the enforcement debtor's cause of action does not arise until he or she has judgment and "an execution against the insured in respect thereof is returned unsatisfied".[343]

In the situation described, the legislation should permit the insured garnishee to direct the insurer to pay any insurance proceeds to the sheriff, or a portion thereof to the enforcement debtor. The insurer should be required by legislation to comply with the direction. The creditor need not know that this has taken place. The obligation of the garnishee under the garnishee summons would continue, but should the insurer not comply with the direction as required (and pay the enforcement debtor directly, for example), and the creditor seeks judgment against the garnishee, the garnishee should have a right to third party the insurer in creditor's proceedings and to be indemnified by the insurer if it is established that insurance existed and the direction had been given to the insurer.

RECOMMENDATION 81:

ATTACHMENT OF AN INSURED CLAIM

Where the garnishee is insured with respect to an attached future entitlement, the garnishee should be permitted to direct the insurer to pay the appropriate portion of the insurance proceeds to the sheriff when liability of the garnishee to the debtor is determined. The insurer should be required to comply with the undertaking.

If the insurer fails to comply, the garnishee should be able to seek indemnity from the insurer in the proceedings brought by the creditor against the garnishee for judgment and should be indemnified if it is established that the garnishee was entitled to insurance coverage and the direction was given.

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[342] *Insurance Act*, s. 320.

[343] *Ibid.*

(14) Payment into Court in the Proceedings between the Garnishee and the Enforcement Debtor

A garnishee against whom the enforcement debtor has commenced an action should not be prejudiced procedurally in his or her defence of the enforcement debtor's claim by the fact of the garnishment. Accordingly, we also adopt a recommendation made by the British Columbia commission[344] that the process of attachment of future contingent entitlements should not interfere with the ability of the garnishee to use the provisions of the Rules of Court relating to payments into court or interpleader.

The garnishee should be required, when making payment into court in the action between the enforcement debtor and the garnishee, to give notice of the garnishment to the clerk of the court. The legislation should direct the clerk, having received such notice, not to make payment out to the enforcement debtor if the payment in is accepted in compromise of the action, but rather to make payment out in accordance with the garnishment.

RECOMMENDATION 82:

PAYMENTS INTO COURT IN THE PROCEEDINGS BETWEEN THE GARNISHEE AND THE ENFORCEMENT DEBTOR

Where a contingent future obligation is attached, the garnishee should still be able to make a payment into court to effect a compromise of the litigation or in the course of interpleader proceedings. The garnishee should, however, be obliged to give notice of the garnishment to the clerk of the court.

If the payment in is accepted by the enforcement debtor, the clerk of the court should not make payment out to the enforcement debtor but should be required to pay in accordance with the garnishment.

(15) Two Garnishment Remedies or One?

Does the expansion of the scope of garnishment necessitate the establishment of two separate procedures? Is it necessary that future obligations be attached by a second, distinct type of garnishee summons that is separate from that used to currently present obligations?

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[344] LRCBC Attachment, *supra*, note 202 at 57.

The British Columbia commission recommendations contemplate two garnishment processes: the writ of immediate garnishment and the writ of continuing garnishment.[345]

The new Ontario Rule does not contemplate two processes. The same procedure is used to attach either a present or future debt. Although the Ontario Rules and the notice of garnishment form that they prescribe contradict each other, it appears that a creditor can attach a present debt and a future debt in one notice of garnishment.[346]

We see no impediment to a combined process. The same procedure should be used for the attachment of a present or future obligation. Where a future obligation is attached, however, the forms will have to communicate that clearly to the garnishee, because the kind of response required will be different in such a case. The garnishee must be informed clearly as to the exact scope of his or her obligation.

RECOMMENDATION 83:

ONE GARNISHMENT PROCESS

The same procedure should be used for the attachment of present obligations as is used for the attachment of future obligations. The forms should be designed for use in either situation and should clearly communicate to the garnishee the full extent of his or her obligations depending on the nature of the materials filed in support of the garnishment.

F. Attachment of Conditional Debt

The third limitation of the scope of garnishment arising out of the words "debts due or accruing due" is the exclusion from attachment of conditional debts where the condition is not merely administrative or procedural.

We observed previously that no clear and reliable test exists for determining whether or not a particular condition on payment of a debt will preclude attachment. Cases decided by the Alberta Court of Appeal demonstrate a considerable range of attitude. In *Sandy* v. *Yukon Construction Co. Ltd.*,[347] a progress payment under a construction contract, not payable to the subcontractor judgment debtor until after the receipt by the contractor of a certificate from the architect, was held attachable, even though the certificate had not been issued. At the other extreme, the same court, in *Hutterian Brethren*[348] refused to uphold a purported attachment of a debt evidenced by a term deposit certificate, the terms of which required that the certificate, which was not negotiable, be surrendered upon redemption. That provision was not satisfied by service of a garnishee summons.

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[345] *Ibid*. at 37, 60.

[346] Rule 60.08(2)(g) seems to contemplate attachment of a future debt only where there is no debt currently due; however, the Notice of Garnishment Form 60G requires the garnishee to pay all debts now payable, and all debts that become payable, within six years.

In *Bel-Fran*,[349] which involved facts similar to those in *Hutterian Brethren*, the British Columbia Supreme Court held that similar conditions did not preclude attachment. The conditions were merely matters of procedure and administration. No real prejudice would be suffered if they were considered satisfied by the service of the garnishee summons.

In the Hutterian Brethren case, Prowse J.A. observed:[350]

> I am also of the opinion that service of the demand [the attachment] does not satisfy the condition in those certificates which requires the certificate to be surrendered on redemption. Although the court in the Bagley case was prepared to hold that service of a garnishee constituted a demand in law, it was not prepared to hold that it amended generally the terms of the contracts entered into between a bank and its customers. I do not treat that case as authority for the proposition that a court should override provisions of a *bona fide* contract merely because it appears to the court that undue harm will not result from doing so.

We propose that the authority that the court could not find in the case law should be provided by statute.

Since 1956, the English legislation has provided that certain preconditions to the payment of deposits by banks do not prevent such accounts being attached as debts due.[351] The New South Wales Law Reform Commission has proposed

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[347] *Supra*, note 285.

[348] *Supra*, note 286.

[349] *Supra*, note 285.

[350] *Hutterian Brethren*, *supra*, note 286 at 378.

[351] The present legislation is the *Supreme Court Act*, 1981, which provides:

(continued...)

a more extensive list of "disregardable" conditions.[352] We recommend similar legislation as the first of two reforms in this area.

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[351](...continued)

> 40(2) In determining whether, for the purposes of the jurisdiction of the High Court to attach debts for the purpose of satisfying judgments or orders for the payment of money, a sum standing to the credit of a person in an account to which this section applies is a sum due or accruing to that person and, as such, attachable in accordance with the rules of court, any condition mentioned in subjection (3) which applies to the account shall be disregarded.
>
> (3) Those conditions are -
>
> (a) any condition that notice is required before any money or share is withdrawn;
>
> (b) any condition that a personal application must be made before any money or share is withdrawn;
>
> (c) any condition that a deposit book or share-account book must be produced before any money or share is withdrawn; or
>
> (d) any other prescribed condition.
>
> (4) The Lord Chancellor may by order make such provision as he thinks fit, by way of amendment of this section or otherwise, for all or any of the following purposes, namely -
>
> (a) including in, or excluding from, the accounts to which this section applies accounts of any description specified in the order;
>
> (b) excluding from the accounts to which this section applies all accounts with any particular deposit-taking institution so specified or with any deposit-taking institution of a description so specified.

[352] New South Wales Law Reform Commission, *Attachment of Moneys Deposited with Building Societies and Credit Unions* (Sydney: NSWLRC, 1985) at 46.

RECOMMENDATION 84:

CONDITIONS AFFECTING ATTACHABLE DEPOSITS

There should be a statutory list of conditions, similar to the list contained in the English *Supreme Court Act*, 1961, that are deemed not to prevent attachment of a deposit held by an enforcement debtor.

Such a list would facilitate creditor access to a significant source of possible recovery without judicial intervention; however, there are likely to be situations, both within and outside the context of institutional deposits, where an unlisted contractual precondition to the payment of a debt will unreasonably prevent attachment. In such cases, the court should have the authority to require the garnishee to ignore the condition or to order some alternative method of satisfying the condition.

Such authority would be used where the court was satisfied that the garnishee would suffer no prejudice as a result. Inconvenience for which the garnishee might be compensated in costs should not, for this purpose, constitute prejudice.

The enforcement debtor should be entitled to object to the waiver of a condition, and in such a case the court would be required to balance the interests of the creditor, the debtor, and perhaps, the garnishee. A jurisdiction to delay the waiver on terms that would give the debtor an opportunity to meet the debt by instalments, similar to the jurisdiction now existing in the case of an application for removal and sale, would be in order. For example, where the enforcement debtor held an RRSP, the conditions of which prohibited collapse without the debtor's instructions, and the collapse of which would cause the debtor serious tax consequences, the enforcement creditor might apply for a waiver of the condition. The enforcement debtor would probably object. The court, in determining whether or not to require the waiver of the condition, might consider such factors as the amount of the debt, the availability of other exigible assets, and the ability of the debtor to satisfy the debt by instalment payments. It might impose conditions on any order it made to reflect the relative merits of such factors.

Ultimately, the interest of the creditor in being paid should outweigh the interests of the debtor. The potential prejudice to the debtor should not justify the asset escaping the enforcement process altogether. The discretion should be merely to delay, or to require the creditor to take another route if one is available.

Alternatively, the court could order some substitute action that would eliminate the prejudice, or it could order the enforcement debtor to satisfy the condition, where that would not unreasonably prejudice the enforcement debtor.

One of the traditional objections to the attachment of future entitlement has been that the enforcement creditor might obtain greater rights than the enforcement debtor had, if the garnishee can be required to pay the sheriff before he or she could have been required to pay the enforcement debtor. Such an objection can be easily eliminated by a statutory provision to the effect that the garnishee cannot be made to pay pursuant to the garnishment before the earliest time that he or she could have been required to pay by the enforcement debtor.

RECOMMENDATION 85:

JUDICIAL DISCRETION REGARDING CONDITIONS OR CONTINGENCIES

The court, on application of the enforcement creditor, should be authorized to order:

a) that the condition affecting the debt otherwise attached be waived and the garnishee required to make payment into court, notwithstanding the condition, where the court is satisfied that such an order would cause no prejudice to the garnishee;

b) that the enforcement debtor satisfy the condition, where the court is satisfied that such an order would cause the enforcement debtor no unreasonable prejudice, or

c) that some alternative action be taken to permit the garnishee to make payment pursuant to the garnishee summons, notwithstanding the condition, without suffering prejudice.

No such order should have the effect of requiring the garnishee to make payment into court pursuant to the garnishee summons before the earliest time that he or she could have been required to make such payment pursuant to the terms of his or her relationship with the enforcement debtor.

G. Wage Garnishment

(1) Retention of Wage Garnishment

In the Report for Discussion, we set out the arguments both for and against the abolition of wage garnishment.[353] After carefully weighing those arguments, we tentatively concluded that wage garnishment should be retained.[354] The considerations that led us to this conclusion included our policy of universal exigibility; the efficiency of garnishment compared to seizure; that wage garnishment taps the resource from which the debtor, if he or she were co-operating, would most likely pay the debt; that the debtor can be protected by exemptions and legislation prohibiting dismissal because of the garnishment; and that inconvenience to the garnishee is not great and can be reduced further. The comments that we received on this conclusion strongly agreed with it. We do not consider it necessary to discuss the issue further in this report.

RECOMMENDATION 86:

RETENTION OF WAGE GARNISHMENT

Wage garnishment should be retained as a remedy for judgment creditors.

(2) Prohibition of Dismissal from Employment

Wage garnishment is something of a nuisance for employers, and some have been known to attempt to avoid repetition of the nuisance by terminating the employee. The *Employment Standards Code* attempts to prevent this response. Section 115 provides:

> No employer or other person shall dismiss, terminate, lay off or suspend an employee for the sole reason that garnishment proceedings are being or may be taken against an employee.

Breach of this section is an offence, and an offender is subject to a significant fine.[355]

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[353] Report for Discussion, *supra*, note 4 at 331-37.

[354] *Ibid*. at 335.

[355] *Employment Standards Code*, ss 118, 122. The fine for a corporation can be up to $10,000, and for an individual up to $5000.

Unfortunately, the section is not as forceful as it might be. The use of the word "sole" permits the section to be interpreted as not prohibiting dismissals where garnishment is a contributing factor, even the most significant factor, as long as there is another justification as well. In our estimation, receipt of a garnishee summons should never be acceptable as a justification, even a partial justification, for dismissal of an employee. We think that the section would be improved substantially by removing the word "sole".

RECOMMENDATION 87:

PROHIBITION ON TERMINATION

The receipt of a garnishee summons by an employer should never be acceptable as a justification, even a partial justification, for dismissal of an employee. Section 115 of the *Employment Standards Code* should be amended by removing the word "sole".

(3) Garnishment of Current Wages

One source of considerable inconvenience to garnishees arises because many large employers have a large and complex payroll system. The processing of documentation leading to the issuing of a salary cheque often begins long before pay-day. The system might be practically committed several days in advance of pay-day to the issuing of a cheque on pay-day.

If a garnishee summons is served immediately before the day on which a cheque is to be issued, the employer must interrupt the process to prevent the cheque being issued to the employee. It then must invoke a separate procedure for issuing the employee a cheque for the exempt portion of his or her wages, and a second cheque must be sent to the court in response to the garnishee summons. The inconvenience to the garnishee is considerable.

We think that it is unreasonable to expect employers to suffer this kind of inconvenience. A garnishee summons should be effective only in respect of wages payable in the current pay period if it is served 10 days before pay-day. If the pay period is less than 10 days, then the summons should be effective if served five days before pay-day. That the garnishee summons will have a continuing effect renders this restriction on the attachment of wages due in the current pay period acceptable.

RECOMMENDATION 88:

GARNISHMENT OF CURRENT WAGES

A garnishee summons should be effective only in respect of wages payable for the current pay period if it is served 10 days before pay-day. If the pay period is less than 10 days, then the summons should be effective if served five days before pay-day.

H. Funds in Court

Under the present law, where there is a fund in court to which a judgment debtor is entitled, it cannot be reached by garnishee summons. Funds in court cannot be attached by garnishee summons because they are not debts owed to the debtor.[356]

Equity provided the remedy of the charging order to fill this void. In Alberta, two legislative provisions have replaced the equitable charging order. Section 7 of the ECA permits the sheriff, or any interested party, to apply for an order that a fund in court belonging to an execution debtor be paid to the sheriff for distribution as proceeds of execution. Rule 494 creates a procedure whereby a creditor can apply for an order, generally called a "stop order", directing that money, stock or security in court not be dealt with except upon notice to the creditor.

We can see no reason why funds in court should not be as susceptible to garnishment as any other entitlement of the enforcement debtor. Where there is in court a fund to which an enforcement debtor is or might become entitled, service of a garnishee summons on the clerk's office would direct the clerk to pay the appropriate amount to the sheriff, instead of to the debtor. Of course, the clerk would pay nothing to the sheriff until it was clear that the fund in court (or some part of it) was payable to the debtor. The two provisions cited in the preceding paragraph would be redundant to this garnishment process.

The Law Reform Commission of British Columbia came to the same conclusion.[357] The Ontario commission, however, chose not to modify the existing stop order procedure. They considered the British Columbia proposal and said:

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[356] *Provincial Treasurer of Alberta v. Zen* [1981] 5 W.W.R. 188 (B.C.S.C.); *Kristiansen & Sons v. Olmstead* [1988] 6 W.W.R. 265 (Man. Q.B.).

[357] LRCBC Attachment, *supra*, note 202 at 49.

> While perhaps theoretically more appealing, the garnishment of funds in court could give rise to somewhat unusual consequences: in some cases, for example, a court official might be required to dispute a judgment creditor's claim.[358]

We do not share this concern. A garnishee is not entitled to dispute the validity of the judgment upon which the enforcement activity is founded. The Ontario Commission cannot therefore have thought that the court official would have to challenge the validity of the enforcement creditor's judgment.

There could be a dispute over whether the clerk is, or might become, indebted to the enforcement debtor; but, in such circumstance, the court official would do nothing different than is done at present in an interpleader. If the fund was currently payable, the clerk would give notice to those who claimed entitlement to have the matter resolved by the court. If the fund was a possible future entitlement, the clerk would respond to the garnishee summons by observing that the entitlement was subject to some contingency, and would await the resolution of the contingency.

RECOMMENDATION 89:

FUNDS IN COURT

Garnishment should replace both the stop order and the ECA, section 7, application as the means by which an enforcement creditor can attach a fund in court to which the enforcement debtor is, or might become, entitled. The creditor wishing to enforce against funds in the hands of the clerk should serve a garnishee summons.

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[358] OLRC Part 2, *supra*, note 57 at 257.

CHAPTER 8
COURT-ORDERED ENFORCEMENT

The standard enforcement processes discussed so far in this report should be effective in the majority of situations that a creditor might face. We expect, however, that occasionally there will be circumstances to which the standard processes are not well suited. The principles that all property of the debtor should be subject to enforcement, save only deliberate exceptions, and that no property should be "exempt" for lack of an enforcement process require the system to provide for situations where the standard processes are inadequate.

Historically, deficiencies in the standard processes were remedied by court-designed or administered processes. The limitations of the common law enforcement remedies led to the development of a number of additional remedies that could be ordered in situations where the common law remedies were unavailable. Some of these court-ordered remedies were authorized by statute. Garnishment[359] and the charging order[360] are examples. Other remedies were developed by the courts of equity. These included "sequestration", the "equitable charging order",[361] and receivership.

These remedies are available to some extent in the present enforcement system. The provision of the *Judgments Act, 1838*[362] which created the statutory charging order, is probably still in force in Alberta.[363] A statutorily authorized, court-ordered charging order is the prescribed enforcement method to be used against a partnership interest of a debtor.[364] Sequestration is contemplated by Rules 351(3) and 353 for use in two narrowly defined situations. Equitable charging orders have their modern manifestation in the "stop order" contemplated in Rule 494. These remedies will be discussed later in this chapter. By far the most significant present-day equitable remedy is receivership, and it will be convenient therefore to focus our discussion on it first.

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[359] *Common Law Procedure Act, 1854* (U.K.), 17 & 18 Vict., c. 125, ss 60-67.

[360] *The Judgments Act, 1838* (U.K.), 1 & 2 Vict., c. 110, s. 14.

[361] As distinct from the statutory charging order.

[362] (U.K.), 1 & 2 Vict., c. 110, s. 14

[363] Dunlop, *Some Aspects of the Charging Order as Remedy for Unsecured Creditors* (1967) 3 U.B.C. Law Rev. 83.

[364] *Partnership Act*, ss 25, 26, 75.

A. Equitable Receivership

Equitable receivership developed in the 18th and 19th centuries as the reaction of the courts of equity to the limitations of the common law execution remedies.[365] The remedy is tailored specifically for the individual circumstances in which it is ordered. The creditor applies for an order appointing a receiver of a specific asset belonging to the debtor. In making the appointment, the court gives the receiver such specific powers as are required to deal with the situation effectively and to produce from the asset a fund for satisfaction of the debt. Notwithstanding the name of the remedy, the receiver is not limited to receiving the asset.[366]

In Alberta, the jurisdiction to grant an order appointing an equitable receiver is confirmed by the *Judicature Act*:

> 13(2) An order in the nature of a mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made, and the order may be made either unconditionally or on any terms and conditions the Court thinks just.

It appears that this jurisdiction is not used extensively, at least in the context of execution. In our examination[367] of 2316 judgments filed in 1980 and 1981 in three Alberta judicial districts, we found only seven in which there had been an application for the appointment of a receiver, and only four of these were granted. Moreover, three of these were appointed in circumstances that, by 1982, the Court of Appeal had held did not support the appointment of a receiver.[368]

The infrequent use of the process can be explained by the expanded scope of legal execution remedies. Many of the assets over which receivers have from time to time been appointed, including equitable interests in personal and real property, can now be subjected to legal execution.[369] Under the recommendations that we have made with regard to the expansion of the scope of garnishment, a considerable number of the remaining situations in which a receivership might still be sought will be brought within that remedy.[370]

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[365] Accounts of the history and development of equitable remedies, in particular equitable receivership, are presented in Dunlop, *supra*, note 1 at 277-306.

[366] See discussion, *infra*, at 244 ff. regarding the powers of the receiver and of the existing Canadian authority, which suggests that a receiver's power is limited to receiving.

[367] Research Paper, *supra*, note 3 at 160.

[368] *Fox* v. *Peterson Livestock Ltd.*, *supra*, note 291.

[369] *Seizures Act*, s. 4; *Land Titles Act*, s. 122.

The jurisdiction to grant receivership is discretionary. Although courts have emphasized that the discretion is to be exercised in a principled way,[371] distillation of a consistent set of principles from the cases is difficult. In this regard, Professor Dunlop has observed:

> The law is difficult to state because of the vacillation of the equity judges as to the proper rules to lay down, a vacillation which has continued into the 20th century and which permeates the cases on equitable execution today.[372]

Professor Edinger has written:

> One hopes that no other area of the law contains as many actually and apparently conflicting and unsatisfactory cases as that part of debtor-creditor law which concerns the appointment of equitable receivers.[373]

Occasionally, the courts take a narrow view of their jurisdiction; occasionally, a broad view. The first extreme is demonstrated by *Fox* v. *Peterson Livestock Ltd.*,[374] in which the Alberta Court of Appeal refused to appoint a receiver to divert an imminent distribution of oil royalties to the members of an Indian band, one of whom was the judgment debtor. The court held that equitable receivership should be ordered only where the asset is of a kind susceptible to a legal enforcement process and the nature of the debtor's interest in the asset presents a hindrance to such legal enforcement. Here, there was no legal process that could be used. The debtor's possible entitlement was not a debt due or accruing due and could not be the subject of garnishment. Furthermore, it was not the nature of the debtor's interest in the asset but the nature of the asset itself, or, more accurately, that no asset existed at the time of the application, that prevented exercise of the jurisdiction.

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[370] For example, in the circumstances of *Fox* v. *Peterson Livestock, supra,* note 291, and *Martin* v. *Martin, supra,* note 300, garnishment would be possible under the expanded garnishment remedy that we have recommended: see *supra,* at 203 with respect to the *Fox* case. As for the *Martin* case situation, the future salaries of federal employees would be subject to garnishment because s. 6(a)(ii) of the *Garnishment, Attachment and Pension Diversion Act*, R.S.C. 1985, c. G-2, provides that future salaries can be attached "where the garnishee summons has continuing effect under the law of the province".

[371] *Fox* v. *Peterson Livestock Ltd., ibid.* "So, while the appointment of a receiver is a discretionary matter, the basic principles must be applied in the exercise of that discretion" (per Belzil J.A. at 314). .

[372] Dunlop, *supra,* note 1 at 283.

[373] E.R. Edinger, *The Appointment of Equitable Receivers: Application of Rules or Exercise of Pure Discretion?* (1988) 67 C.B.R. 306 at 308.

[374] *Supra,* note 291.

The other extreme is demonstrated by *Martin* v. *Martin*,[375] where Grange J. appointed a receiver of a portion of the future salary of a federal government employee who was not susceptible to garnishment. He recognized that his judgment was inconsistent with late 19th-century English authority,[376] but said:

> If I am to order a receiver or a receiver-manager appointed here, I may not be in conflict with any judgment binding on me but I must concede that I am not following precedent. However, I do intend to make the order and I think I can justify it in law.
>
> It is after all the statute that governs. We have here a debtor who agreed to make certain payments and to have that agreement incorporated in the judgment; who, although he had a ready recourse to vary that judgment legally, chose instead to vary the terms illegally and unilaterally and to ignore Court processes and orders bringing him to account; and who has concealed his assets from attachment. Perhaps most important of all the debt is for the support of his family and no evidence is offered that he is not fully able to pay.
>
> It is just that he be made to pay; it is convenient that a receiver be appointed because there is no other way that the debt can be collected, no other way that the Court's orders can be enforced.[377]

Professor Edinger has stated four principles that appear to govern the exercise of the equitable jurisdiction, notwithstanding the frustrating inconsistency of their application by the courts:

> . . . first, the asset must be of a kind that is exigible by a common law or legal process; second, there must be some impediment to employment of a legal process;

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[375] *Supra*, note 300.

[376] In particular, *Holmes* v. *Millage* [1893] 1 Q.B. 551 (C.A.).

[377] *Martin v. Martin*, *supra*, note 300 at 722.

> third, there must be some benefit to be obtained by the appointing of an equitable receiver and the appointment must be just and convenient; but fourth, special circumstances established by the judgment creditor may permit the court to disregard the second rule.[378]

The purpose of equitable receivership is to overcome barriers to legal execution. The expansion of the scope of the legal enforcement processes will serve to eliminate many of the kinds of hindrances that could be met at present only by the appointment of a receiver. For example, Professor Edinger suggests that in the present state of the law, if the rules that she cites were applied as she thinks that they should be, equitable receivership could be used to permit enforcement against the debtor's interest in a joint bank account, which is not attachable by garnishment. Similarly, the equitable remedy could be used to enforce against debts not subject to garnishment by reason of some condition or contingency. If our previous recommendations regarding garnishment are implemented, these present hindrances to garnishment will be removed by legislation. Equitable receivership will not be required in those situations.

The reforms that we have proposed will not, however, eliminate all the situations where equitable receivership is sought and often granted at present. We think that the continuing evolution of society, property rights, commercial activity and the law in general will produce situations where, notwithstanding reform of the standard remedies, a judicially designed remedy will be required.

A recent Ontario case demonstrates how the remedy will continue to be useful. In *Canadian Film Development Corp.* v. *Perlmutter*,[379] the debtor had arranged his affairs so that his substantial earning capacity was exercised through corporations that he owned and that paid the expenses he incurred to support an extravagant lifestyle. He never received income directly. The evidence clearly established that these arrangements had been made so as to render it impossible for his creditors to collect. The court concluded that the complex scheme made by the debtor created sufficient practical impediment to execution to warrant the appointment of a receiver. The receiver would receive income payable to the companies for the benefit of the debtor and was given such specific powers as were necessary to make the receivership effective.[380]

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[378] Edinger, *supra*, note 373 at 308.

[379] (1986) 53 O.R. (2d) 283 (Ont. H.C.).

[380] In *Attorney General of Canada* v. *Rahley* (1980) 36 C.B.R. 280 (N.S.S.C.), the court appointed a receiver to upset the byzantine complexity of the debtor's affairs, which constituted a more than substantial impediment in the way of ordinary modes of recovery.

In recent years, receivership has become particularly useful for enforcement against a debtor's interest in registered retirement savings plans ("RRSP").[381] Seizure and the expanded garnishment remedy that we have proposed in this report might be of use in this context as well,[382] but receivership can be particularly useful where the maximization of the yield from liquidating a RRSP requires careful and specific attention. In *National Trust Co. v. United Services Fund et al.*,[383] the creditor sought and was granted the appointment of a receiver even though seizure might have been available against the shares held in the RRSP account, since the offering of the shares at once would likely depress the price and because there were means of liquidating the plan that would minimize the portion of the proceeds that would be taxable.

Equitable receivership is useful as well to overcome less sophisticated practical impediments. In *Garry Finance Corp.* v. *Heizman and Smith*,[384] the debtor's equity in each of several used cars was too small to justify the cost of individual seizures. In *McCart* v. *McCart and Adams*,[385] the debtor was owed many small debts. Garnishment of each one would have been too costly. In both cases, equitable receivership was considered a more convenient remedy. We think that a discretionary process must continue to be available to meet situations of this kind.[386]

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[381] *Toronto Dominion Bank v. Berczowsky* (1987) 49 Alta. L.R. (2d) (Alta. Q.B.); *Vancouver A & W Drive-Ins Ltd. v. United Food Services Ltd.* (1981) 38 B.C.L.R. 30 (B.C.S.C.).

[382] The existing seizure remedy has been effective against assets held in a RRSP: *Wyebee Developments Ltd. and Salmon v. First Investors Corp.* (1986) 44 A.R. 348 (Alta. Q.B.); *National Trust Co. Ltd. v. Lorenzetti* (1983) 148 D.L.R. (3rd) 575 (Ont. H.C.); but garnishment has generally not been available because of the absence of a debt relationship: see *Re Bliss et al.* (1983) 3 D.L.R. (4th) 425 (Ont. H.C.J.).

[383] (October 24, 1986), Van. Reg No. C864336 (B.C.S.C.) [unreported].

[384] [1939] 1 W.W.R. 541 (Man. C.A.) [hereinafter *Garry Finance*].

[385] [1947] O.W.N. 48 (Ont. H.C.).

[386] The Ontario Law Reform Commission reached the same conclusion: OLRC Part 2, *supra*, note 57 at 234:

> Convenience — to the judgment creditor, to the judgment debtor and to the proposed enforcement regime — also has been one of the Commission's major objectives in reform of the law of enforcement. In all our recommendations, we have striven to maximize the effectiveness of the various modes of enforcement and to minimize the

(continued...)

We do not think, however, that the future usefulness of equitable receivership is confined to those situations for which a legal process is technically available but cannot function efficiently. We think that the equitable remedy will be useful as well in situations where, given the present limits on exigibility and the principles governing equitable receivership, it might not be available at all at present.

The policy of universal exigibility stimulates expansion of the scope of the legal remedies. We believe that it also brings about an automatic expansion of the scope of the remedy of equitable receivership. The first principle governing the exercise of the judicial discretion to appoint an equitable receiver, as identified by Professor Edinger,[387] is that the asset against which the remedy is sought must be of a kind that is exigible by a common law or legal process. The policy of universal exigibility renders this rule obsolete. Given universal exigibility, there is no justifiable distinction between cases where a legal remedy is available but cannot function effectively and cases where no legal remedy is available.

In her article, Professor Edinger contemplates that an expansion of the scope of equitable receivership of this nature might be in order. Speaking of cases where the first rule has been circumvented, she says:

> It may be a justifiable extension if equitable receivers are to constitute an available form of relief, but it must be recognized as an extension which transforms equitable execution into a residual supplement to execution at law.[388]

We think equitable receivership should now be recognized as a residual remedy — one that can be applied for in any situation where no other remedy is available or where the available remedy cannot be used effectively.

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[386](...continued)

> harassment of debtors. We believe that a receivership remedy of general import would contribute to a realization of our objectives. Therefore, we recommend that a judgment debt should be enforceable by means of receivership, regardless of the nature of the debtor's property, and notwithstanding that some other method of enforcement is available, in accordance with the recommendations made hereafter.

[387] See text at note 378, *supra*.

[388] Edinger, *supra*, note 373 at 333.

RECOMMENDATION 90:

RETENTION OF EQUITABLE RECEIVERSHIP

The remedy of receivership should be maintained as an enforcement process available to creditors who have filed writs of enforcement with the sheriff in cases where no other remedy is available or where the available remedy cannot be used effectively.

(1) Judicial Involvement

The Ontario Law Reform Commission recommended that receivership be available on application to the enforcement office. They thought that judicial involvement was unnecessary:

> Since we view receivership as merely another method of enforcement, consistent with our recommendations concerning execution and garnishment, we believe that judicial involvement in the appointment of a receiver should be kept to a minimum. We have arrived at this conclusion for two reasons. First, it is the opinion of the Commission that receivership entails no greater risk to those concerned in the enforcement process than execution and garnishment. Like execution, receivership, in the usual case, will involve merely receiving and selling the debtor's property. Secondly, given the degree of risk involved in receivership, we do not believe that the costs resulting from judicial involvement at this stage can be justified.[389]

We do not agree with this conclusion. The receivership remedy will often be appropriate in cases where judicial involvement is essential. The Ontario case of *Re Simon and Simon*[390] provides an example. There, a receivership of an Ontario Hydro employee's future pension entitlements was sought by his former wife. The relevant legislation provided that pension entitlements were exempt from execution or attachment except that, "where a person is receiving payment under a pension plan", the payments could be attached for the satisfaction of a support or maintenance order. The exception did not apply because the employee was not yet receiving the pension. The court appointed a receiver on the basis that the exemption provision did not apply to equitable enforcement, and that a receiver was appropriate in the circumstances. The court relied on the judgment creditor's demonstration that it was extremely difficult, if not impossible, to obtain satisfaction by any other means, and that there was justification for apprehension that the pension benefits might be removed from the jurisdiction.

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[389] OLRC Part 2, *supra*, note 57 at 235.

[390] *Supra*, note 300.

We think that the kind of assessment that was required in that case should not be undertaken by anyone other than a judge.

We concede that where the hindrance to legal enforcement is purely mechanical or practical, such as in *Garry Finance*[391] or *McCart* v. *McCart and Adams*,[392] the sheriff could easily determine the powers that the receiver might need.[393] Even in a simple case, however, a determination is required that receivership is the best route, that it is just and convenient, and that no less expensive remedy will serve to bring the creditor satisfaction. We do not think that the responsibility for this kind of determination should be assigned to the sheriff.

The reforms that we have proposed for the other enforcement processes were intended to give them greater scope but to minimize the necessity for active judicial involvement in their operation. We conceive seizure and garnishment to be "off-the-shelf" remedies that might require minor alterations from time to time to make them fit but, as a rule, do not require judicial involvement. In the typical receivership case, there would be something about the situation — the nature of the asset, the conduct of the debtor, the complexity of the debtor's financial arrangements — that would call for powers beyond those that the statute gives to the sheriff or creditors for use in more ordinary situations. We see receivership as a "tailor-made" remedy, fabricated according to a pattern, but crafted to fit a particular situation. The tailor should be the court.

RECOMMENDATION 91:

JUDICIAL INVOLVEMENT

Receivership should be initiated by order of the court. Its availability should continue to be at the discretion of the court, and the court should tailor the remedy to suit the circumstances of the case in which it will be used.

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[391] *Supra*, note 384.

[392] *Supra*, note 385.

[393] In fact, in *Garry Finance, supra*, note 384, receivership might not have been needed. The sheriff might have had sufficient flexibility under our previous recommendations to employ the same kind of sales method as would have been employed by a receiver.

(2) Principles Governing the Discretion

We referred above to the four principles that Professor Edinger has identified as governing the present jurisdiction to order a receivership. It will be convenient to repeat them here:

> a. The asset against which the order is sought must be of a kind that is exigible by a common law or legal process;
>
> b. there must be some impediment to employment of a legal process;
>
> c. there must be some benefit to be obtained by appointing a receiver, and the appointment must be just and convenient; however,
>
> d. special circumstances established by the judgment creditor might permit the court to disregard the second rule.

As we concluded above, the policy of universal exigibility has rendered the first rule obsolete. All the debtor's assets are now exigible, except those that have been made exempt deliberately. Receivership should be available whether or not there is a specific legal process that can be used against the kind of asset in question.[394]

The courts have been inconsistent in their application of the second rule. It has been held that the only kind of impediment that receivership can remove is one arising out of the equitable nature of the debtor's interest in the asset.[395] Other cases have held that the legal impossibility of enforcing against a specific asset, though the general class of assets was exigible, was included in the kinds of hindrance that receivership could remove. For example, receivership could be ordered for a debt owed by the Crown that could not be subjected to garnishment because no process could be issued against the Crown.[396]

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[394] We believe that the adoption of the policy of universal exigibility removes the problem discussed by Professor Edinger as to whether for the purposes of the first rule the classification of the property should be broad or narrow. The more narrow the classification, the more likely that it will be held that the property is not exigible at common law and the less likely that the first rule will be satisfied. For example, if application is made for the appointment of a receiver of the debtor's interest in a joint bank account, the first rule will not be satisfied if the question is "Are joint bank accounts subject to attachment?", but it will be satisfied if the question is "Are debts subject to attachment?". If all property is exigible, it does not matter which question is asked.

[395] Edinger, *supra*, note 373 at 320.

Cases in which the Rule 4 exception to Rule 2 has been applied have held that receivership could be ordered to remove hindrances that were merely practical or mechanical, notwithstanding that a legal enforcement process was technically available.

We think that the distinction between the kinds of hindrances that receivership could and could not remove are no longer relevant. They now serve only to mystify the remedy and to confuse those who try to understand or apply it. This was recognized judicially in the development of the Rule 4 exception to Rule 2. It should now be given statutory recognition as well. Receivership should be available wherever it can be used to counter a hindrance to the effective use of the standard remedies, regardless of the nature of the hindrance, and subject only to a determination that its use is "just and convenient".[397]

The factors that the court might consider in determining whether the appointment of a receiver is just and convenient will develop over time. In the present system, Rule 466 provides a minimum list of factors:

> 466. Where an application is made for the appointment of a receiver by way of equitable execution, the court in determining whether it is just or convenient that the appointment be made shall have regard
>
> > (a) to the amount of the debt claimed by the applicant,
> >
> > (b) to the amount which may probably be obtained by the receiver, and
> >
> > (c) to the probable costs,
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> and may direct any inquiries on these or other matters before making the appointment.

We think that it might be useful to add the following factors to a minimum list of factors that can be considered:

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[396] *Ibid*. at 321.

[397] Edinger, *ibid*. at 323-27, discusses the use of the remedy of equitable receivership to overcome hindrances created by exemptions legislation. She approves of the use of the remedy to overcome such impediments when the court finds that the exemption provision is preventing enforcement in circumstances where it was not intended to have that effect.

a. The extent to which the receivership might inconvenience or prejudice the debtor or third parties;[398]

b. whether or not the other enforcement processes provide adequate means of reaching the asset;[399]

c. the availability of other assets against which other processes would be effective;

d. the amount of the outstanding writs of enforcement against the debtor; and

e. whether there is anything the receiver could do that the sheriff enforcing a writ could not.[400]

It should be clear that the list is not exhaustive and that none of the factors are determinative. They are simply factors to be taken into account.

We intend that the term "just and convenient" should not be restricted by existing judicial interpretations of the term. The court's discretion should not be restrained by rules creating artificial limitations on the availability of the remedy. We note Professor Edinger's warning that, "Untrammelled discretion has a notoriously short lifespan, moreover, so the rules will resurface as guidelines".

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[398] For an example, see *ibid.* at 330:

> . . . in *Yorkshire Trust Co.* v. *239745 B.C. Ltd. and Day* the Supreme Court of British Columbia refused to appoint a receiver for a Registered Retirement Saving Plan because the judgment for which the creditor was seeking satisfaction was under appeal. It was reasoned that if the appeal were to succeed, there would be no way the appellant could be put back in the same position if the receiver had collapsed the Plan and Revenue Canada had collected the tax due. While one might suggest that the receiver could have been appointed on condition that he delay acting until the appeal was heard, the principle is clear: the appointment must be fair to both parties.

[399] *Ibid.* at 322.

[400] For a discussion of this factor see Edinger, *supra,* note ? at 330:

> If the courts discovers [sic] that the sheriff and the receiver are equally impotent then the application for appointment of a receiver should fail.

The legislation should also provide expressly that the artificial limitations discussed above are abandoned.

RECOMMENDATION 92:

PRINCIPLE GOVERNING DISCRETION

The appointment should be made where the standard enforcement processes cannot be employed effectively and it is just and convenient that a receiver be appointed. The courts should be given a list of factors that can be considered in determining whether or not the appointment is just and convenient. The statute should also make it clear that the remedy is available whether or not the asset is one that is susceptible to the standard enforcement processes. It should also be available regardless of the nature of the impediment or hindrance that prevents use of a standard enforcement process.

(3) Specific Assets

The receivership should be specific to a particular asset of the debtor. We do not conceive of this enforcement process as having the scope of a receivership order in bankruptcy. A creditor could not apply for a receivership of "all of the exigible assets of the debtor". The creditor should be required to identify a specific asset or class of assets for which the receivership is required.

At the same time, we do not intend that this requirement should foreclose the use of the process in situations where the asset for which it would be useful is capable of a general description only. For example, where the debtor operated a finance business, the assets of which were various secured accounts receivable, a general identification of the asset for which the order was sought would suffice.

RECOMMENDATION 93:

SPECIFIC ASSETS

A receivership should be granted only for a specific asset or class of assets. It should not be ordered for the exigible assets of the debtor generally.

(4) The Receiver

Only a person who is competent and willing to carry out the tasks that will be required in the particular situation, and whose integrity is warranted,[401] should be appointed as a receiver. The statute should provide the means of establishing that both those qualifications exist.

It might be that the most appropriate party to act as receiver in a particular case will be the sheriff. This might be appropriate where the receivership involved the sale of a clearly defined group of assets, such as the used cars in *Garry Finance* case. It probably would be inappropriate if the receivership involved the management of assets and not simply their disposal, or where some other more specialized skill was required. The statute should expressly contemplate the sheriff fulfilling this function if he is willing to do so. It should also authorize the sheriff to delegate his powers as receiver as he considers appropriate.

In other cases, someone with particular business or other expertise might be more appropriate as receiver. Professor Edinger notes that there is no legal impediment to the creditor being appointed receiver, and that from a cost point of view such an appointment might be very desirable.[402] She observes that concern about a conflict of interest in such a case would be misplaced:[403]

> Since both the judgment creditor and the judgment debtor want the maximum return from the property so as to reduce or satisfy the debt, it is difficult to see how there could be a conflict of interest in the ordinary sense.

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[401] In the present system, this is accomplished by the receiver giving security. Rule 463(1) provides:

> Where an order is made directing the appointment of a receiver, other than the sheriff or deputy sheriff, the person appointed shall, unless the court otherwise orders before acting give security to be approved by the court to account for what he shall receive and to pay it as the court shall direct.

[402] Edinger, *supra*, note 373, says that this was done in *Kuss* v. *Kuss* [1935] 2 W.W.R. 561; *Yorkshire Trust Co.* v. *239745 B.C. Ltd. and Day* (1983) 45 B.C.L.R. 361 (B.C.S.C.); *Flegg* v. *Prentis* [1892] 2 Ch. 428; *RE No. 39 Carr Lane, Acomb. Stevens* v. *Hutchinson and Another* [1053] 1 All E.R. 699 (Ch. D.).

[403] Edinger, *supra*, note 373 at 329, note 71.

We agree with these observations. In the proper case, and subject to the proper controls, the court should be able to appoint the creditor as equitable receiver.

RECOMMENDATION 94:

THE RECEIVER

A person who is competent and willing to carry out the tasks that will be required in the particular situation, and whose integrity is warranted, should be appointed as a receiver. This might be the sheriff, or in the proper case, and subject to the proper controls, even the creditor.

(5) Powers and Duties of the Receiver

The present statutory provisions do not attempt to set out the powers of the receiver. The only statutory direction given is in section 13(2) of the *Judicature Act*, which authorizes the court to order the receivership "on any terms and conditions the Court thinks just".

Professor Edinger comments on the powers of receivers as follows:

> The cases reveal the same lack of consistency with respect to the powers of a receiver as they do with respect to the rules for appointment. The weight of English authority authorizes a court to empower a receiver to sell, to manage, and even to litigate. Canadian courts have had doubts about the power to sell and requests for an equitable receiver-manager have been rare. Since the enactments empowering the courts to appoint equitable receivers contain no restrictions as to the powers that may be conferred, the English practice is probably correct. Nevertheless, the court must always be satisfied that the duties imposed on the equitable receiver are not too expensive and too complex.[404]

Since the remedy is to be tailored to the situation in which it is ordered, it would be inappropriate for the statute to establish a set of powers that would accompany every appointment; however, we are concerned that the existence of Canadian authority, cited by Professor Edinger, might be interpreted as limiting the kinds of powers that the court could give to a receiver. We do not think that such general limitation is appropriate. Both the powers and their limitations should be tailored to the individual case. Accordingly, we think that the statute should provide clearly that there is no limitation on the kinds of power that the court can give the receiver.

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[404] *Ibid*. at 329 [Footnotes omitted].

For the sake of clarity, the statute should provide a non-exhaustive list of specific powers that the court can grant. These might include the power to sell, manage and litigate. We intend that the term "receiver" should include the concept of the "receiver manager".

The statute should also list the minimum duties of the receiver. Existing statutory lists, which include some of the powers and duties that might be included, can be found in the *Dependent Adults Act,*[405] the *Business Corporations Act*[406] and the PPSA.[407]

RECOMMENDATION 95:

POWERS AND DUTIES OF THE RECEIVER

The statute should provide that the court can grant the receiver whatever powers are necessary to carry out the receiver's responsibility. There should be no limitation as to the kinds of powers that the court can give the receiver. The powers should be tailored to fit the circumstances. For the sake of clarity, the statute should provide a non-exhaustive list of specific powers that the court might grant. The statute should also list the minimum duties of the receiver.

B. Court-fashioned Enforcement Process

There might be situations where the standard enforcement processes would not be effective but where the appointment of a receiver also seems inappropriate. For example, we noted previously that seizure of an interest in unpatented land appears to be contemplated by the *Public Lands Act*, but there is no procedure established for effecting the seizure, or for realizing upon the interest once it is seized.[408]

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[405] Sections 28-30.

[406] Sections 96, 214, 215.

[407] Section 65.

No doubt a receiver, perhaps the sheriff, could be appointed in such a situation, and the terms of the order might be designed so as to provide the missing procedure; however, we think that it should not be necessary for the court to appoint a receiver if an effective enforcement process can be fashioned by the court without such an appointment. We think that the court should have the power to give directions as to how the enforcement, in such circumstances, is to be carried out. Undoubtedly, the standard processes would provide the model, and the court could order such variations as are necessary to ensure the effectiveness of the process and the protection of the various interests involved.

The court's ability to fashion a remedy for situations where no process is provided by statute will ensure that universal exigibility is achieved to the extent that it is possible. The failure of the statute to provide a specific remedy for a particular form of property will not be significant. It is therefore unnecessary that the reformed legislation attempt to provide an enforcement process for every conceivable form of property — which in any case would probably be impossible.

We recognize, for example, that the specific enforcement processes that we have recommended for the reformed legislation might not be appropriate for enforcement against such assets as copyrights and patents. The Ontario legislation does expressly contemplate enforcement against this class of asset and does provide at least part of the process that would be necessary to carry it out. We have not thought it worthwhile, however, to recommend that the reformed legislation contain an enforcement process for application in this particular area, because this kind of asset, in all probability, is only rarely the target of enforcement efforts. We think that this is a situation that can be left to court-ordered enforcement, by use of either a receivership order or an enforcement order that does not involve the appointment of a receiver.

RECOMMENDATION 96:

COURT-FASHIONED ENFORCEMENT PROCESS

The court should have the power to give directions for enforcement against a specific asset when the standard enforcement processes are not suitable. The process ordered should ensure the protection of all interests that require protection.

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[408] See *supra*, at 183.

C. *In Personam* Remedy

All the enforcement processes discussed so far operate against the property of the debtor as opposed to the debtor personally. The force of the remedy is exerted on property through seizure or attachment, sale or payment. None of the processes require the debtor to do anything. They are intended to operate in the absence of the debtor's co-operation and without his or her assistance.

Unfortunately, the successful operation of the processes often requires that the debtor remain passive and not interfere. These are not always realistic expectations. Debtor's have been known to attempt to shield assets from enforcement by hiding them or removing them from the jurisdiction.

Where the debtor is hiding an asset or — by some inventive means short of a fraudulent conveyance — shielding it from enforcement, we think that the creditor should have a remedy. We think that in an appropriate case the court should simply order the debtor to produce the asset so that it can be subjected to enforcement. The order would be an "*in personam*" remedy, or one directed against the debtor himself, not against the property. It would be enforceable by contempt proceedings.

We do not think that this remedy should be easily available. It should be necessary for the creditor to establish first that there is in fact an exigible asset, that access to the exigible asset cannot be obtained using the standard enforcement methods or receivership, and that the debtor is capable of delivering or otherwise obeying the order sought. Standards similar to those that we have proposed for the pre-judgment attachment order would be appropriate.[409] In fact, the remedy that we are proposing is in the nature of a post-judgment attachment order.[410] It might be ordered in conjunction with a receivership order, or as a term of a receivership order, and it might include terms prohibiting the debtor from disposing of or otherwise dealing with the asset, in addition to terms requiring him or her to deliver it up for enforcement.

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[409] *Prejudgment Remedies, supra,* note 5, Recommendation 4 at 174, the relevant part of which reads as follows:

> An attachment order may be granted only where the court is satisfied that . . .
>
> (b) there are reasonable grounds for believing that the defendant is disposing of or dealing with his property, or is likely to do so (i) otherwise than for the purpose of meeting the reasonable and ordinary business or living expenses of the defendant, and (ii) in a way that is likely to seriously hinder the claimant in the enforcement of any judgment he might get against the defendant; and
>
> (c) it would be just and equitable, taking into account the interests of the claimant, the defendant, and any affected third persons, to grant an attachment order.

One might object that the remedy that we suggest, if in an individual case it progressed as far as imprisonment of the debtor, would be inconsistent with the recommendation that we made as a general principle governing this project: that imprisonment for debt should be expressly abolished. We believe, however, that the imprisonment that might occur would not be imprisonment for debt, it would be for contempt of court in failing to do something that it had been established that the debtor was capable of doing and had been ordered to do. The remedy could not result in a debtor who had no property with which to satisfy the judgment being imprisoned. The distinction between imprisonment for debt and committal for contempt of an order to produce specified exigible property seems to us to be clear.[411]

Further, there might be occasions when the asset is not in the jurisdiction, either because the debtor has removed it or because of the nature of the asset. We think that an *in personam* remedy should be available in this context as well. The court should be able to require the debtor to do anything that will make enforcement possible and that it is in the debtor's power to do. For instance, the debtor could be ordered to bring back certain property that has been removed from the province.

RECOMMENDATION 97:

IN PERSONAM REMEDY

Where the sheriff has been unable to realize a specific exigible asset of the debtor because of the interference

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[410] *Orwell Steel (Erection and Fabrication) Ltd. v. Asphalt and Tarmac (U.K.) Ltd.* [1985] 3 All E.R. 747 (Q.B.D.); *Babanaft International Co. S.A. v. Bassante* [1989] 1 All E.R. 433.

[411] The situation that arose in *MacNeil v. MacNeil* (1975) 25 R.F.L 357 (N.S.C.A.) would not be covered by our proposed *in personam* remedy. We referred to this case in Report for Discussion, *supra*, note 4, at 106, 224. There, the debtor had not been ordered to produce specific property for execution. He had been ordered to pay a specific amount of maintenance. The court found him in contempt for concealing and removing assets from the jurisdiction so as to make execution impossible. Under our proposal, the debtor would not be in contempt unless he or she had been ordered not to remove or otherwise deal with a specific asset, but rather to yield it up for enforcement.

of the debtor, or for any other reason, the court should have the power to grant an *in personam* order requiring the debtor, if it is within the debtor's power to obey, to deliver up the asset for enforcement or to take any other steps possible to make the asset available for enforcement or to effect a liquidation of the asset or the completion of a sheriff's sale.

D. The Charging Order

Section 14 of the *Judgments Act, 1838*[412] provided that where a judgment debtor had "Government Stock, Funds, or Annuities, or any Stock or Shares of or in any Public Company in England (whether incorporated or not)", the court could order that the property be charged with the amount of the judgment debt. Such an order would "entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor . . .".

It appears likely that this provision is still part of the enforcement law of Alberta;[413] however, it is used rarely. In our empirical study, we found no files in which charging orders were granted.[414] Professor Dunlop comments:[415]

> . . . the charging order was and is an infrequent occurrence in the Canadian law reports. The reason is that Canadian legislatures have been quick to amend their execution statutes to make shares and dividends specifically exigible. Thus the more important of the two categories of assets which were subject to the cumbersome and tricky charging order process can now be seized using a writ of execution and Canadian

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[412] (U.K.) 1 & 2 Vict., c. 110, s. 14.

[413] Dunlop, *supra*, note 1 at 163:

> Canadian courts early decided that the charging order sections of the *Judgments Acts*, 1838 and 1840, were part of our law in so far as they had not been repealed or amended by local legislation.

[414] Research Paper, *supra*, note 3 at 47.

[415] Dunlop, *supra*, note 1 at 163.

> lawyers have tended to use the simpler and better known remedy.[416]

A similar type of procedure has been prescribed in the *Partnership Act*[417] for enforcement against a debtor's partnership interest. The creditor may apply for an order charging the debtor's partnership interest with the debt. By the same or a subsequent order the court may appoint a receiver of the debtor's share of the partnership profits. The act appears to contemplate that the charge could be foreclosed upon and the interest ordered sold.[418]

The Ontario Law Reform Commission recommended that the charging order remedy be abolished. The commissioners reasoned:[419]

> Our review of the law pertaining to charging orders has led us to conclude that this method of enforcement is an historical anomaly, one that in some cases is redundant under the present law of enforcement in Ontario, and that would be unnecessary given our proposals for reform of the law of enforcement. It is the view of this Commission that charging orders should be abolished as a method of enforcing a judgment debt. We believe that the Commission's proposals for the reform of the law of execution, garnishment and equitable execution, if enacted, will obviate the need for reliance on a remedy described by one commentator as "slow and cumbersome and unfamiliar to the Canadian practitioner and judge".

We have come to the same conclusion. The property against which a charge might be obtained under the *Judgments Act* provision would be more effectively enforced against using other enforcement processes as they exist at present or as altered pursuant to our proposals. Given our proposal that all exigible property should be bound by the writ of enforcement from the time it is registered in the PPR, a court-ordered charge would, in a sense, be redundant.

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[416] The charging order remedy does not permit creditors to avoid the main deficiency of the existing process of enforcement against shares — the difficulty created by a restriction on share transferability that applies to a sheriff's sale. Our recommendations discussed above in the context of enforcement against shares would remove this difficulty.

[417] *Partnership Act*, s. 26.

[418] Section 26(2) contemplates the other partners buying the debtor partner's interest "if a sale is directed" presumably in proceedings to enforce the charge.

[419] OLRC Part 2, *supra*, note 57 at 250.

Further, the *Judgment Act* charge arguably gives the creditor a "secured creditor" status, which could unjustifiably remove him or her from the operation of the sharing principle.

In the context of the *Partnership Act*, like the Ontario Commission, we think that the charging order procedure serves no purpose that could not be accomplished as efficiently and effectively by a receivership order alone. We think that the *Partnership Act* should be amended to contemplate only a receivership order being made. The reformed legislation would, of course, give the same protection to the partners of the debtor that is provided at present.

We note as well that the charging order is no longer required for use in enforcement against government securities, such as Canada Savings Bonds held by the execution debtor. Seizure and redemption of domestic bonds issued by the Government of Canada is contemplated and controlled by regulations enacted under the *Financial Administration Act*,[420] which provide:

> 21(1) Where a registered bond has been seized pursuant to a writ of exemption [sic] or other like process issued out of a court,
>
> (a) in the case of a bond that is transferable, upon presentation of the bond and an authenticated copy of the writ of execution or other like process issued out of the court, the Bank [of Canada] may register the sheriff to whom the writ of execution or other like process is directed as owner of the bond or enter his name in the bond accordingly; and
>
> (b) in the case of a bond that is not transferable, upon presentation of the bond and an authenticated copy of a writ of execution or other like process issued out of the court, the Bank may redeem the bond and pay the value thereof to the sheriff to whom the writ of execution of other like process is directed.[421]

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[420] *Financial Administration Act*, R.S.C. 1985, c. F-ll, s. 60(1)(b)(i).

[421] Domestic Bonds of Canada Regulations, C.R.C. 1978, c. 698, s. 21(1).

RECOMMENDATION 98:

THE CHARGING ORDER

The charging order remedy established by the *Judgments Act, 1838* should be abolished.

The charging order procedure provided by the *Partnership Act* for enforcement against a debtor's interest in a partnership should be abolished and replaced by a receivership procedure that accomplishes the same purpose and gives the same protection to other partners.

E. Sequestration

Sequestration was used by courts of equity as a means of pressuring a party against whom an order had been made to obey it. The personal or real property of the party might be seized under the writ and held until the court's order was obeyed. Professor Dunlop notes:

> [The writ of sequestration] was used whether the contempt was in failing to appear and answer the bill or in failing to obey the decree. Originally, property seized by the sequestrators was simply detained until [the judgment debtor] complied with the order in question. By 1750, however, equity was permitting sequestrators on final process (*i.e.*, where sequestration had issued to enforce a decree) to sell sequestered property and to use the proceeds to pay the judgment creditors' claim.[422]

Although the Court of Queen's Bench probably has jurisdiction to issue a writ of sequestration in any circumstances where it might have been issued by the English Court of Chancery,[423] the only existing provisions that mention the remedy at present are Rules 351, 352 and 353. They contemplate the use of sequestration only as a means of enforcing obedience of a court order. Rule 351(3) provides that sequestration can be used as an alternative to holding a defendant in contempt, where there has been disobedience of a judgment directing the recovery of specific property other than land or money. Clearly, that rule does not intend to establish sequestration as an enforcement process for money judgments. Consideration of the Rule therefore is outside the scope of this project.

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[422] Dunlop, *supra*, note 1 at 279.

[423] *Judicature Act*, s. 5(1).

Rule 352 directs that a writ of sequestration be directed to the sheriff unless otherwise ordered. Rule 353 provides:

> Where a judgment against a corporation is wilfully disobeyed it may be enforced,
>
> (a) by leave of the court, by a writ of sequestration against the corporation property, or
>
> (b) in lieu thereof or in addition thereto, by an order of the court holding in civil contempt the directors or officers of the corporation or any of them; or
>
> (c) in lieu thereof or in addition thereto, by leave of the court, by a writ of sequestration against the property of the directors or officers or any of them.

Although it is not clear from the Rule, we do not think that it is intended to apply to even a wilful failure to pay a money judgment. Since failure to obey an order for the payment of money cannot be punished as contempt of court,[424] we expect that wilful failure of a corporation to pay a money judgment could not attract a contempt or sequestration order under this rule. Accordingly, consideration of this rule is also outside the scope of this project.

If there is a residual jurisdiction for the equitable remedy of sequestration, we think that it is redundant. Our intention is that any situation that could conceivably arise where the standard enforcement remedies were ineffective would be handled by a receivership order with appropriate terms. It might be that those terms would be in essence the same as might have been contained previously in a writ of sequestration.

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[424] Rule 703(1).

CHAPTER 9
EXEMPTIONS

One of the principal policies advocated in this report has been "universal exigibility". Creditors should have access to all the debtor's property, regardless of its form, subject to deliberate exceptions only. We have recommended that no property should be immune from enforcement for the lack of an enforcement process or the means of adapting one. Property should be beyond the reach of creditors only where a conscious decision has been made that it should be exempt from enforcement.

In previous chapters we have proposed reforms directed to the achievement of the first half of this policy — the establishment of enforcement processes available or adaptable for all forms of property. We now turn to the second half of the policy — the determination of the deliberate exceptions.

A. Policy of Exemptions

We think that it is unnecessary to undertake an extensive discussion of the history behind or the policy underlying exemptions from enforcement. The history of exemptions and the development of exemption legislation, particularly in western Canada, is interesting and well described in several works.[425] It emerges from those descriptions that many of the motivations that lay behind early exemptions provisions are now obsolete. Exemptions legislation is no longer directed to the attraction of settlers or motivated by a prejudice against eastern or urban creditors.

As usual, there are a multitude of interests that the legislative policy must attempt to balance. All the direct and indirect participants have an interest in the structure and operation of the exemptions system: debtors, creditors, credit granters, employers, vendors of exempt property, governments, and society at large. We do not propose to catalogue the various interests involved.

It seems to us that an extensive analysis of these points is unnecessary because the basic and fundamental policy of exemptions legislation is relatively clear and undisputed.

The enforcement processes should not destroy the debtor as a viable economic and social entity. The law, in the interests of all participants, must protect debtors from forfeiting so much of their property and potential as would render it impossible or unreasonably difficult for them to maintain themselves and their dependants at a reasonable standard and with reasonable security that they can continue to do so. There is also considerable social interest in preserving the viability of debtors. If creditors were allowed to destroy debtors' economic viability, their continued maintenance would fall to society. The result would be a net asset transfer from the public purse to creditors.

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[425] Dunlop, *supra*, note 1; OLRC Part 2, *supra*, note 57; MLRC Part 2, *supra*, note 260.

There is, we believe, a secondary policy that is included in the first policy, but it would be useful to describe it separately. The law should protect debtors from the loss of so much of their property and potential that they are unable to rehabilitate themselves by acquiring the means to discharge their debts.

It seems to us that the purpose of exemptions legislation is to protect debtors' present ability to maintain themselves and their families, to protect a measure of security that their ability to do so will continue in the future, and to foster restoration of their personal economy.

We recognize that these policies also underlie the bankruptcy system in its application to non-corporate bankrupts. This is to be expected. The goals of the enforcement and bankruptcy systems are essentially the same — to assist creditors to recover as much as possible out of the estate and potential of the debtor while protecting the debtor from economic and social destruction in the process. It should not be thought that the policies are within the exclusive province of one or the other of these two systems — they are essential to both. No system that seeks to facilitate the repayment of debt should ignore the need to protect the debtor from economic destruction through its application.

Our aim in this chapter is to review the existing structure of exemptions against the background of these policies and to recommend such reforms as are necessary to realize them more fully.

B. The Existing Structure

There are two main "statutory" sources for the existing enforcement exemptions law: the *Exemptions Act* and the Alberta Rules of Court.[426] The former establishes the property that is exempt from enforcement by seizure, creates some exceptions to these exemptions and contains provisions necessary to the administration of the exemptions system. The latter establishes the exempt portion of a debtor's wages, creates exceptions, and gives procedural directions applicable to wage exemptions. In addition, there are other isolated exemption provisions in other statutes that create either further exemptions[427] or exceptions to exemptions.[428]

To facilitate our examination of the structure of the existing exemption system, it will be convenient to set out the main provisions that describe the property exempt from enforcement at present.

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[426] Rules 483, 484.

[427] *Insurance Act*, s. 265(1); *Pension Benefits Act*, s. 14; *Civil Service Garnishee Act*, s. 5.

[428] *Masters and Servants Act*, s. 7(4).

(1) The *Exemptions Act*, Section 1(1)

The following real and personal property of an execution debtor is exempt from seizure under a writ of execution:

(a) the necessary and ordinary clothing of the execution debtor and his family;

(b) furniture and household furnishings and household appliances to the value of $4000;

(c) cattle, sheep, pigs, domestic fowl, grain, flour, vegetables, meat, dairy or agricultural produce, whether or not prepared for use, or such of them as will be sufficient either themselves or when converted into cash to provide

(i) food and other necessaries of life required by the execution debtor and his family for the next 12 months,

(ii) payment of any money necessarily borrowed or debts necessarily incurred by the execution debtor

(A) in growing and harvesting his current crop, or

(B) during the preceding period of 6 months, for the purpose of feeding and preparing his livestock for market,

(iii) payment of current taxes and one year's arrears of taxes or in case taxes have been consolidated, one year's instalment of the consolidated arrears, and

(iv) the necessary cash outlays for the ordinary farming operations of the execution debtor during the next 12 months and the repair and replacement of necessary agricultural implements and machinery during the same period;

(d) horses or animals and farm machinery, dairy utensils and farm equipment reasonably necessary for the proper and efficient conduct of the execution debtor's agricultural operations for the next 12 months;

(e) one tractor, if it is required by the execution debtor for agricultural purposes or in his trade or calling;

(f) either

(i) one automobile valued at a sum not exceeding $8000, or

(ii) one motor truck,

required by the execution debtor for agricultural purposes or in his trade or calling;

(g) seed grain sufficient to seed the execution debtor's land under cultivation;

(h) the books of a professional person required in that person's profession;

(i) the necessary tools and necessary implements and equipment of the value of $7500 used by the execution debtor in the practice of his trade or profession;

(j) the homestead of an execution debtor actually occupied by him, if it is not more than one quarter section, but if it is more, the surplus may be sold subject to any lien or encumbrance on it;

(k) the house actually occupied by the execution debtor and buildings used in connection with it, and the lot or lots on which the house and buildings are situated according to the registered plan thereof, if the value of the house, building and the lot or lots does not exceed $40,000, but if the value does exceed $40,000, the house, building and lot or lots may be offered for sale and if the amount bid at the sale after deducting all costs and expenses exceeds $40,000 the property shall be sold and the amount received from the sale to the extent of the exemption shall be paid at once to the execution debtor and is until then exempt from seizure under any legal process, but the sale shall not be carried out or possession given to any person until the execution debtor has received $40,000;

(l) the mobile home actually occupied by the execution debtor if the value of the mobile home does not exceed $20,000, but if the value does exceed $20,000 the mobile home may be offered for sale and if the amount bid at the same after deducting all costs and expenses exceeds $20,000 the mobile home shall be sold and the amount received from the sale to the extent of the exemption shall be paid at once to the execution debtor and is until then exempt from seizure under any legal process, but the sale shall not be carried out or possession given to any person until the execution debtor has received $20,000.

(2) Alberta Rules of Court, Rule 483(1)

Where the debt due to an employee is for wages or salary the following portion thereof is exempt from attachment by garnishee for each month in respect of which the wages or salary is payable:

(a) if the debtor is a married person, the sum of $700, or

(b) if the debtor is a married person with dependent children

(i) in his or her custody, or
(ii) under his or her control, or
(iii) in respect of whom he or she is paying maintenance,

$700 plus $80 for each child, or

(c) if the debtor is a widow, widower, unmarried mother or divorced person with dependent children

(i) in his or her custody, or
(ii) under his or her control, or
(iii) in respect of whom he or she is paying maintenance,

$515 plus $140 for each child, or

(d) if the debtor is an unmarried person $525.

This exemptions structure gives protection to three categories of property:

e. property that is required to meet basic necessities such as food, clothing and shelter;

f. property that is required by the debtor to earn a livelihood; and

g. a portion of the debtor's income from employment.

The protection of these categories of property is a clear manifestation of the policy of exemptions legislation that we discussed above. Protection is given to what the debtor needs for his or her immediate and future maintenance and to permit some possibility of acquiring income to pay debts.

It might be suggested that there is an unnecessary duplication of effect in exempting both basic necessities and the means of earning income to purchase basic necessities. Would it be better not to protect the basic necessities at all, but rather to give more generous protection to the debtor's income in the expectation that the income will be used to buy basic necessities?

We think that the existing approach is to be preferred. Debtors are in need of both forms of protection. An income exemption is of limited value if food can be seized before it is consumed, or if the clothes purchased with the exempt income can be seized. Basic necessity exemptions are of limited value if the debtor has no income to acquire them or to make payments on them. Debtors and their families cannot subsist without food, clothing and shelter, and cannot maintain a supply of food, clothing and shelter without an income. In any event, we think that a requirement that a debtor elect between the two classes of exemption would not be administratively feasible, especially where the debtor is being pursued by more than one creditor.

(3) Obsolescence of Exemption Provisions

Obsolescence is a common structural problem in exemptions legislation. It can take several forms.

First, the listed specific property items tend to reflect the times when the legislation is enacted. As times and conditions change, the list of exemptions becomes somewhat obsolescent. This is not a great problem with section 1(1) of the *Exemptions Act*. Perhaps with the exception of some of the agricultural exemptions, the listed exempt items are not significantly out of date. To a large extent, obsolescence has been avoided by the use of general categories of exemptions.[429]

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[429] Contrast section 1 with section 2, which establishes the exemptions from seizure in distress proceedings. The section 2 list is more specific and more obsolete than the section 1 list.

What obsolescence there is in the *Exemptions Act* arose because the exemptions were designed for a society that focused more on agriculture than Alberta society does at present. Exemptions that were designed to assist farm debtors in particular are a prominent feature of the Alberta legislation.[430] Six of the 12 subsections mention agriculture or agricultural activity specifically, and four of these deal with agricultural concerns exclusively. The "food" exemption seems to assume that the debtor lives on a farm.

Obsolescence is also a problem in those provisions that establish exemptions by using a monetary limit. Five of the *Exemptions Act* provisions rely on a statutorily set monetary limit: furniture to $4000; automobile to $8000; tools to $7500; urban house to $40,000; and mobile home to $20,000. The wage exemption Rule quoted above also establishes a monetary limit. Inflation renders these limits out of date and erodes the protection granted to debtors. The exigencies of government are such that amendments necessary to maintain the currency of the provisions have been made only sporadically. There has not been anything approaching a continued vigilance to ensure the currency of the monetary limits. On occasion, the limits have fallen so far behind the times that judicial comment has been provoked. In 1982, McDermid J.A. called for legislative attention to section 1(1)(k), which then provided that equity in an urban house would be exempt to $8000. He said:

> Such an exemption is rather meaningless for $8000 would not buy the land for a good size rabbit hutch in the city of Calgary today. There was an exemption of $1500 for the house and four lots in an urban centre under the Ordinances of the Northwest Territories. This was increased to $3000 in 1922 and to the present $8000 in 1953. It has not been changed since.

Two years later, the Alberta Legislature responded by increasing all five of the monetary limits in the *Exemptions Act* provision.[431]

Several techniques could be employed to reduce or eliminate these obsolescence problems. For example, all the obsolescence problems might be eliminated by leaving the determination of just exemptions to the court. This is the approach taken under the *Bankruptcy Act* for the wages or salary of the bankrupt.[432] Such an approach would be an unacceptable alternative, because

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[430] *Exemptions Act*, s. 1(1)(c)(d)(e)(f)(g)(j).

[431] Furniture from $2000 to $4000; automobile from $2000 to $8000; tools from $5000 to 7500; urban house from $8000 to $40,000; and mobile home from $2000 to $20,000.

[432] *Bankruptcy Act*, R.S.C. 1985 c. B-3, s. 68:

(continued...)

an application in each case would be too expensive for the parties and too great a burden for the courts.[433]

A possible solution to the problem of obsolete descriptions might be not to give any description of exempt property, but rather to grant debtors exemption for such property as they might select up to a specified monetary limit. Such an approach, however, would not serve the policy of exemptions — to ensure that debtors retain property necessary for domestic and occupational subsistence. Although it would not be a fair generalization for the majority of debtors, some have demonstrated considerable irresponsibility in getting into the situation where they require the protection of exemptions legislation. Where this is so, it would be unreasonable to rely on the debtor to select such property as would secure economic integrity. Society has the right to take a paternalistic approach so that the exemptions serve the purpose for which they exist.

Moreover, not all debtors are situated alike. The monetary value of what a debtor needs to remain economically viable will vary from debtor to debtor. A function-based exemption structure is more likely to suit the debtor's circumstances than one that exempts any property up to a set monetary limit. Further, the administrative cost of a system that required every piece of property for which exemption was claimed to be valued would be unacceptable.

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[432](...continued)

> (1) Notwithstanding section 67, where a bankrupt is in receipt of, or is entitled to receive, any salary, wages or other remuneration from any person employing, or using the service of, the bankrupt, in this section referred to as the "employer", the trustee, if directed by the inspectors or the creditors, shall apply to the court for an order directing the payment to the trustee of such part of the salary, wages or other remuneration as the court may determine, having regard to the family responsibilities and personal situation of the bankrupt.

The *Bankruptcy Act* does not rely on this approach for other exemptions; rather it adopts the provincial system of exemptions from execution. Section 67(c) excludes from the property of the bankrupt divisible among his creditors, "any property that as against the bankrupt is exempt from execution or seizure under the laws of the province within which the property is situated and within which the bankrupt resides".

[433] We have recommended a "discretionary exemption" in the context of continuing garnishment: see Recommendation 77, *supra*, at 211. We think that such a provision is necessary in the context of that new remedy because of the unique problems that an unanticipated interruption in cash flow could create for a debtor, third parties, and the creditor in that context. We do not think, however, that the concept should be adopted in the exemption context generally.

We believe that the only acceptable means of protecting the legislation from obsolescence is to use general descriptions of the classes of exempt property, where appropriate, with a quantity limit established by reference to either time[434] or a monetary limit. The debtor can, we think, be given the responsibility, at least at first instance, of choosing which items of such property are to be exempt.

We acknowledge that the use of general descriptions of the exempt property creates a need for judicial attention more frequently than would be the case if more specific descriptions were used. Under the present statute, questions such as "What is *'ordinary'* clothing?",[435] or "What is a *'necessary of life'*?",[436] or "What are *'necessary'* tools?"[437] must ultimately be submitted to judicial determination. We think that this is an acceptable price to pay for an exemptions system that remains relatively up-to-date.

We do not think that any other attempt should be made to remedy the problem of obsolete descriptions. Ensuring that the policy of the law is not frustrated by changes in the means by which the basic necessities are generally met, and by which incomes are earned, must be a continuing responsibility of the Alberta Legislature, with the assistance of such bodies as law reform agencies, consumer protection groups, and other interest groups in society. There is no practical substitute for this continuing attention.

As for the present provisions concerning the agricultural industry, we review below the individual exemptions established for farm debtors, and we recommend that the statute be restructured so that its central focus is not on participants in any one industry. Such of the specific farm debtor exemptions as continue to be appropriate should be put together in a section directed specifically to the protection of farm debtors. They should not be mixed up with exemptions granted to all debtors regardless of the industries in which they are involved.

Despite the problem of obsolescence through inflation, we do not think that it is desirable that exemptions be described without the use of monetary limits. Whereas monetary limits might be avoided by more specific descriptions of the exempt property, the risk of the descriptions becoming obsolete would be increased. We think that the effects of inflation should be met by a mechanism that ensures that the monetary limits will be kept up-to-date. There should be a periodic assessment of the monetary limits, and they should be adjusted if it is necessary to respond to inflation. We discuss this subject further later in this chapter.[438]

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[434] Such as is now provided in the *Exemptions Act*, s. 1(1)(c)(i) — food and other necessaries of life required by the execution debtor and his or her family for the next 12 months.

[435] *Ibid*. s. 1(1)(a).

[436] *Ibid*. s. 1(1)(c)(ii).

[437] *Ibid*. s. 1(1)(i).

RECOMMENDATION 99:

STRUCTURE OF THE EXEMPTIONS SYSTEM

The present overall structure of the exemptions system should be continued, whereby protection is given to:

a. property that is required to meet basic necessities such as food, clothing and shelter;

b. property that is required by the debtor to earn a livelihood; and

c. a portion of the debtor's income from employment.

The approach taken in the current statute to avoid obsolescence and promote currency of the descriptions of exempt property, through the use of general descriptions for the classes of exempt property with monetary or other forms of limitation, should be continued.

The exemptions provisions should be restructured so that their central focus is not on the participants in any one industry, such as agriculture. Exemptions appropriate for a specific class of debtors should be stated separately from those appropriate for all debtors.

There should be some mechanism to ensure that the monetary limits are altered to account for inflation.

C. Property Required To Meet Basic Necessities

The question of which categories of property are accurately described as basic necessities is open to debate. Probably, there can be no argument that such things as food, clothing and shelter are basic necessities. For the reasons set out below, we are of the view that, for the purposes of exemptions, it is also reasonable to include transportation and some forms of property that provide a degree of comfort or convenience. In the following discussion we examine how these basic necessities should be accommodated in the exemptions system.

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[438] *Infra* at 313 ff.

(1) Food

The present food exemption is established by section 1(1)(c)(i), which includes a year's supply of food as one of a list of factors to be used to determine the quantity of a debtor's agricultural produce that is exempt. Although it is unlikely to be interpreted as applying only to farm debtors, we think that it is desirable that the provision be removed from its present agricultural context and be clearly made a general exemption.

We would also clarify the term "family", as used in the provision. We think arguments about who might be covered by that term could be avoided by referring to persons for whose maintenance and support the debtor is responsible: in other words, the debtor's dependants.

We would not alter the present time-limit of 12 months. We recognize that in the vast majority of cases the effect of the time-limit will be that all food will be exempt, for it must be rare that anyone would have a year's supply of food in their possession. We expect that the time-limit might continue to be appropriate in the farm context, however, and would therefore retain it.

RECOMMENDATION 100:

FOOD

There should be an exemption for such food, and products from which food can be made, as is sufficient to provide for the reasonable needs of the debtor and for the debtor's dependants, for the next 12 months.

(2) Clothing

The present provision exempts the "necessary and ordinary clothing of the execution debtor and his family".[439] We would alter this in two minor respects. First, we would remove the word "ordinary", which we do not think adds anything useful to the section. Second, we would add the same clarification of the term "family" as we have recommended in relation to food.[440]

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[439] *Exemptions Act*, s. 1(1)(a).

RECOMMENDATION 101:

CLOTHING

There should be an exemption for the necessary clothing of the debtor and for the debtor's dependants.

(3) Shelter

The present exemption for shelter is divided into three parts. First, section 1(1)(j) exempts shelter for farm debtors as part of the exemption of the land from which the farm debtor's livelihood is gained:

> (j) the homestead of an execution debtor actually occupied by him, if it is not more than one quarter section, but if it is more, the surplus may be sold subject to any lien or encumbrance on it;

Second, section 1(1)(k) exempts a minimum portion of an urban debtor's equity in his home:

> (k) the house actually occupied by the execution debtor and buildings used in connection with it, and the lot or lots on which the house and buildings are situated according to the registered plan thereof, if the value of the house, building and the lot or lots does not exceed $40 000, but if the value does exceed $40 000, the house, building and lot or lots may be offered for sale and if the amount bid at the sale after deducting all costs and expenses exceeds $40 000 the property shall be sold and the amount received from the sale to the extent of the exemption shall be paid at once to the execution debtor and is until then exempt from seizure under any legal process, but the sale shall not be carried out or possession given to any person until the execution debtor has received $40 000;

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[440] We note in passing that, exemption or no exemption, it would be difficult to characterize the clothing of a debtor's dependent as exigible property of the debtor. Presumably, such clothing is the property of the dependent, not of the debtor.

Third, section 1(1)(l) exempts the mobile home of a debtor, in a manner that parallels the exemption of an urban house:

> (l) the mobile home actually occupied by the execution debtor if the value of the mobile home does not exceed $20 000, but if the value does exceed $20 000 the mobile home may be offered for sale and if the amount bid at the same after deducting all costs and expenses exceeds $20 000 the mobile home shall be sold and the amount received from the sale to the extent of the exemption shall be paid at once to the execution debtor and is until then exempt from seizure under any legal process, but the sale shall not be carried out or possession given to any person until the execution debtor has received $20 000.

Several criticisms have been made of these shelter exemptions:[441]

a) They discriminate against debtors who do not own their shelter.

b) It is inappropriate for the exemptions system to protect a capital asset when the basic necessity the asset provides is easily obtainable without tying up such a significant portion of the debtor's wealth.

c) The rural debtor is given better treatment than the urban debtor since there is no monetary limit to the exemption of the rural home.

d) The urban house exemption does not achieve its aim of protecting shelter where the debtor's equity exceeds $40,000.

e) The urban house exemption monetary limit can be practically doubled if the property is owned by the debtor jointly with another.

f) The monetary limit is susceptible to going out of date because of inflation.

Discrimination

It has been suggested that the shelter exemptions discriminate against debtors who do not own their shelter because such debtors are not given any exemption for shelter. They must pay for their shelter out of the exempt portion of their wages, whereas home-owner debtors have their wage exemption free for other uses. The suggestion is made that the present shelter exemption should be abolished and the employment income exemptions improved so that they reasonably protect debtors' ability to provide themselves and their families with non-owned shelter.

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[441] OLRC Part 3, *supra*, note 212 at 35.

We do not adopt these suggestions. We think it is inaccurate to say that the provision is discriminatory. The feature of the shelter provisions that is criticized as being discriminatory is shared by almost all other exemption provisions. Every exemption provision that protects specified property from enforcement benefits the debtor who owns property of the specified description but does not benefit the debtor who does not. The objection made in the context of shelter also applies to the automobile exemption, since the debtor who owns a car has a capital asset protected, whereas the one who does not own a car must pay taxi or bus fares out of the exempt income. The exempt income of the debtor who does own a car is free of that burden. The objection applies to the food exemption as well, since the debtor who has squirrelled away enough food for a year can protect all of it, whereas one who has not done so must use the income exemption to buy food.

Provisions that exempt specifically described property necessarily give a greater benefit to debtors who have such property than to those who do not. We think that it would be unjust to permit creditor access to the property that a debtor has acquired for use in satisfying basic necessities simply because another debtor who has not met the basic need in the same way cannot be protected in the same way. Debtors are not equal as far as property holding is concerned when they first come to the exemptions system. The exemptions system should not be criticized if debtors are not equal as far as property holding is concerned when they leave. The exemptions system is not a "wealth leveller".

The suggestion that the owned shelter exemption be abolished in favour of an improved wage exemption assumes that all debtors have income from employment. Retaining the existing structure ensures that debtors who own their shelter but are unemployed are afforded a measure of shelter protection.

The proper inquiry regarding debtors who do not own their homes is whether the wage exemptions are sufficiently high to ensure that debtors who must pay for their shelter out of their exempt income can do so. We believe that the recommendations that we make in that regard later in this chapter are sufficient to give that assurance.

In most cases, the renter debtor and the owner debtor will be in approximately the same situation where the monthly cost of shelter is concerned. If the debtor who owns his or her home is carrying a mortgage, which is likely to be the case where the debtor is in such financial difficulty that exemptions are relevant, the mortgage payments, which must be met for the debtor's shelter to be maintained, will be a draw on the owner debtor's exempt wages roughly equivalent to the shelter costs of the non-owner debtor. Typically, only an insignificant portion of the monthly mortgage payment builds the mortgagor's equity.

It should be noted that the shelter provisions clearly do not "discriminate" in the sense proscribed by section 15 of the Canadian Charter of Rights and Freedoms as the section has been interpreted by the Supreme Court of Canada.[442] The Court decided that discrimination means ". . . a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group . . ." (McIntyre J.), and it was suggested that the personal characteristic must be analogous to those enumerated in section 15. We believe that the distinction between people who own their homes and people who do not is not one based on a personal characteristic and is not analogous to the characteristics listed in section 15. We think that the distinction made by the shelter exemptions, and for that matter by all specific property exemptions, between those who own and those who do not, is an example of the distinction that legislatures must make to govern effectively.

Tying up Capital

The second criticism of the present shelter exemption is that it is the purpose of the exemptions system to protect shelter and not to protect home ownership. Debtors are entitled to shelter, but the provision of shelter can be accomplished without protecting such a significant capital sum. It is beyond the purpose of the exemptions system to protect a capital asset where a non-capital substitute is easily available.

This reasoning appealed to the Ontario Law Reform Commission, which recommended that there be no exemption of the debtor's home *per se*, but that the first $2000 of the sale proceeds be paid to the debtor to be used in covering relocation expenses. The normal procedure for the execution sale of real property would provide the debtor with sufficient delay to arrange relocation.[443]

The Ontario commission observed:

> The exemption has nothing to do with home ownership as such, but is merely adequate to prevent the debtor and his family from being deprived of shelter.[444]

We do not agree with this criticism of the owned shelter exemption. The Ontario approach amounts to a determination that debtors should be required to be renters; and that home ownership is inappropriate for those who cannot satisfy judgment debts. We are not convinced that this would be an accurate reflection of the attitude of Alberta society.

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[442] *Law Society of British Columbia v. Andrews* [1989] 1 S.C.R. 143.

[443] OLRC Part 3, *supra*, note 212 at 38.

[444] *Ibid*. at 39.

Albertans attach substantial importance to home ownership. Government programs to assist persons who do not own homes to acquire them are common. The monetary limit of the urban house exemption has always been significantly greater in Alberta than in other Canadian provinces, even before it was raised to its present level of $40,000. Notwithstanding the amount of the house exemption, that unsecured credit is easy to obtain in Alberta indicates that credit grantors hold no real expectation of access to their debtor's owned residence for satisfaction of the debt. While we would agree with the Ontario commission, which observed that "if encouragement of home ownership is a desirable social policy, exemption laws appear to be, at best, an oblique way of achieving this policy",[645] we would suggest that the Alberta provision is more a reflection of an attitude that Albertans generally hold rather than an attempt to encourage it.

We think that most Albertans would consider depriving a debtor who has arrived at the "house-owning stage" of the house to be unreasonably harsh in a manner that depriving him or her of other economic assets would not be. The difference is simply a matter of attitude towards house ownership. We think that the Alberta attitude is that — as a matter of relative values — this highly important interest should be protected, even at the expense of the creditor's interest.

In any case, we think that the argument that an exemptions system should not protect a capital asset from creditors when the debtor could satisfy basic necessities without tying up capital ignores the possibility that a debtor who has unencumbered equity in a house will borrow against it and pay off creditors rather than have all of his or her non-exempt property taken away. Having done so, as we have observed above, he or she will be in approximately the same position as the debtor renter: shelter costs will be paid out of the exempt income in the form of mortgage payments.

Favours Rural Debtors

The next objection to the present structure is that it appears to give greater protection to rural debtors than to urban debtors. McDermid J.A. made the point in *McNeil v. Martin*:[646]

> The *Exemptions Act* provides an exemption for the homestead. If it is located on 160 acres in the country on which there is a home of any value, even of $1,000,000, it is exempt. However, if it is an urban home, then it is only exempt if under the value of $8,000 and, if over that value, then it may be sold and

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[645] OLRC, Part 3, *supra*, note 212 at 35.

[646] *Supra*, note 191 at 328.

> $8,000 of the sale price paid to the execution debtor.[447]

The difference between the treatment of the urban as opposed to the rural debtor is easily explained. The rural land exemption is attempting to accomplish two goals: protection of shelter and protection of the asset — land — with which the debtor earns a livelihood. We consider the continuation of the farm debtor's "livelihood" exemptions later in this chapter.[448]

Further, the urban house exemption is so designed that in some cases the debtor can be required to give up his or her home and to secure alternative shelter, which in the urban context is usually not difficult. This would be unacceptable in the rural context, where there is not likely to be conveniently located alternative accommodation.

It is true that, as the exemptions are structured, debtors who live in the country but do not earn a livelihood from the land on which they live can obtain the benefit of the lack of a monetary limitation, even though the reasons for its absence do not apply to them. The result is that such debtors can shield equity greater than $40,000 from creditors. The result could be avoided by limiting the rural exemption to debtors who derive their livelihoods primarily from farming on land that includes the land where their homes are located,[449] and we recommend that such a change be made to the rural homestead exemption.

Urban Exemption Does Not Protect Shelter

The next objection to the present shelter exemption is that the structure of the urban house exemption prevents it from achieving its aim if the debtor's equity exceeds $40,000. The monetary limit is in the nature of a "threshold". If the debtor's equity exceeds the threshold amount, the house can be sold and, though the debtor will be paid $40,000, he or she will lose the shelter. Depending on the level of the debtor's exempt income and debts, he or she might not be able to finance the purchase of alternate shelter, even with a $40,000 down payment.

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[447] McDermid J.A. pointed out the difference to support his conclusion that the monetary limit on the urban house exemption was unacceptably low. He did not suggest that the urban and rural exemptions should be identical.

[448] For a discussion of farm debtors' livelihood exemptions, see *infra* at 279 ff.

[449] We do not intend that whether the debtor's primary source of income was farming would necessarily be determined on the experience of the year when the determination was being made. The debtor should not lose the rural exemption where the farm is producing insufficient income and he or she must supplement it from other sources. The exemption should be claimable if the intended primary source of income is farming, or if the primary activity of the debtor is farming.

If the debtor converts to rented accommodation, he or she might have difficulty shielding the $40,000 from creditors, for once the $40,000 has been paid to the debtor it is vulnerable to enforcement processes.

We think that this criticism fails to take into account that the debtor with greater than $40,000 equity can avoid having the house sold at all by borrowing against the equity and bringing it below $40,000. The risk of forfeiting non-exempt property to creditors might induce the debtor to use the borrowed money to satisfy creditors.

We agree, however, that the present provision is deficient in not protecting the equity paid to the debtor after the house has been sold. If the equity is below $40,000, it is protected in the form of equity in the house. If the total equity is above $40,000, and the house is sold, $40,000 should continue to be exempt for a period long enough to allow the debtor a reasonable opportunity to use it to secure alternative accommodation. We think that an appropriate period would be six months. During that period, the debtor's equity should be exempt as long as it can be identified as the exempt portion of the proceeds of the sale.

Joint Tenancy

The structure of the urban house exemption produces the circumstance where, if the property is co-owned by the debtor and some other person or persons, either jointly or as tenants in common, the debtor's share of the unencumbered equity must be over $40,000 before the house can be sold. This means that the total unencumbered equity must be $80,000 if there are two co-owners. Consequently, the provision gives considerably greater protection to a debtor who owns with another person than to one who does not. We can think of no justification for this arrangement, and we consider it to be a deficiency in the provision that should be remedied.

The Manitoba legislation takes this problem into account. It exempts $2500 of the debtor's equity if the residence is not held in joint tenancy or tenancy in common, but only $1500 if it is.[450]

We recommend that the Alberta provision be altered similarly by providing that the exempt portion of the debtor's equity in a residence be $40,000[451] or, if the property is co-owned either in joint tenancy or tenancy in common, such portion thereof as equals his or her share of the total equity. For the purpose of such a provision, the individual shares of each co-owner should be assumed to be equal.

For example, if the debtor and his or her spouse own their urban home jointly and the unencumbered equity is $60,000, the applicable monetary limit of the exemption would be half of $40,000, or $20,000. The debtor's share of the equity would be $30,000. Since the debtor's share of the equity is greater than the exemption applicable to him or her, the threshold would have been crossed and the property could be sold in enforcement proceedings. The $60,000 equity would be distributed as follows: $30,000 to the spouse, $20,000 to the debtor, and $10,000 to the sheriff for distribution to creditors. If, in the same circumstances, the unencumbered jointly owned equity were $30,000, the debtor's presumed share would be $15,000, which would be less than the monetary limit of the debtor's exemption — $20,000 — and the property could not be sold in enforcement proceedings.

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[450] *Judgments Act*, R.S.M. 1987, c. J10, s. 13(1).

[451] Or whatever monetary limit is substituted for it: see *infra* at 273.

Obsolescence of Monetary Limit

The final criticism of the shelter exemption is that its monetary limit can become obsolete by reason of inflation. When the Act was amended in 1984 to increase the monetary limits, some members of the Alberta Legislature suggested that even a $40,000 limit was unreasonably low. Mr. Martin said:

> While I support the move, Mr. Speaker, I think it's still not adequate in a couple of areas. I'm chiefly speaking of the value of a home. It's my understanding that they raised it from $8,000 to $40,000. I suggest, though, that in this day and age there are not many homes in Alberta worth $40,000. If we look around, I think the average market value of a house, depending on location of course, would range anywhere from $70,000 to $90,000. There may be the odd house around worth $40,000; I don't know. But you're certainly not going to find them in the city areas. So I would say the amount is somewhat unrealistic.[452]

The same view was expressed by Mr. Notley.[453]

Mr. Kowalski, who moved second reading of the Bill, responded to this observation by noting:

> I think one item needs clarification. With respect to a home, both the Member for Edmonton Norwood and the Member for Spirit River-Fairview talked about the $40,000 proposed exemption under the new Bill. I think it's very, very important to recognize that most homes in our society in the province of Alberta today are in fact owned by two people, a man and a woman, joint tenancy. Under the *Exemptions Act*, that $40,000

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[452] Alberta Hansard, 2nd Session, 20th Legislature, Number 45, at 1098 (May 28, 1984).

[453] *Ibid*.

> item would apply to either or both of the individuals. So in fact what you're really talking about in the case of a joint tenancy situation, in my understanding anyway, is an exemption level to the magnitude of $80,000 rather than $40,000 for a single home. I think that's an interpretation and recognition that is rather important.[454]

The effect of our recommendation regarding the effect of joint tenancy would be to remove this justification for setting the level at $40,000. Accordingly, if that recommendation is accepted, the level of the exemption should probably be reconsidered. We offer no recommendation, except that the level of the exemption be reconsidered along with the alterations that we suggest to its operation in the joint tenancy context.

As for the tendency of whatever monetary limit is set to become obsolete by reason of inflation, we have discussed this point above and wish only to note at this point that this is one of the provisions that we suggest should be subject to the periodic adjustment process that we recommend for all the monetary limits later in this chapter.

RECOMMENDATION 102:

SHELTER

The present shelter exemption, which exempts the rural debtor's home (one quarter section) regardless of its value, and the urban debtor's home if the debtor's equity in it is less than $40,000, should be continued subject to a reconsideration of the adequacy of the monetary limit.

The rural exemption should apply, however, only if the debtor gains the primary portion of his or her livelihood from farming land that includes the land on which the house is located; otherwise, the rural home should be subject to the same exemption provision as an urban home.

Where the debtor's equity exceeds $40,000 and the house is sold and $40,000 is paid to the debtor, the fund or any

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[454] *Ibid.* at 1099. Kowalski went on to compare the proposed Alberta exemption to those applicable in other provinces where the levels are far lower.

portion of it should be exempt from enforcement in the debtor's hands for six months provided the debtor is able to establish that the source of the fund for which such exemption is claimed is the exempt proceeds of an enforcement sale.

Where the debtor owns the exempt home jointly or as a tenant in common with another or others, the exemption limit should be reduced. Only that portion of the standard exemption ($40,000) that equals the debtor's portion of the total equity held by all the co-owners should be exempt. For the purpose of calculating the exemption in such a situation, each joint tenant should be presumed to have an equal share in the equity of the house. The house should not be exempt from enforcement sale if the debtor's share of the equity exceeds the appropriate portion of $40,000.

The monetary limit prescribed by the provision, $40,000 at present, should be adjusted periodically in response to inflation. The process of adjustment should be that recommended below.

(4) Furniture

The present statute creates a specific exemption for "furniture and household furnishings and household appliances to the value of $4000".[455] We would not recommend any change other than that the monetary limit be subject to the periodic adjustment for inflation by the process discussed later in this chapter.

RECOMMENDATION 103:

FURNITURE

The present exemption of furniture and household furnishings and household appliances to the value of $4000 should be continued, with this monetary limit being adjusted periodically in response to inflation.

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[455] *Exemptions Act*, s. 1(1)(b).

(5) Motor Vehicle

In the present exemptions system, a motor vehicle is exempt only if it is required by the debtor for agricultural purposes or in a trade or calling.[456] The present system clearly does not treat a motor vehicle as a basic necessity.

The provision has been interpreted strictly. It has been held that an automobile is not "required" in the debtor's trade or calling unless it is a condition of employment that he or she supply a motor vehicle. In *T & M Holdings Ltd.* v. *Caramignoli,*[457] Master Funduk said:

> Where the judgment debtor is an employee nothing less than an automobile being required as a condition of his employment will suffice. If it were otherwise, every employee who occasionally uses his automobile to run errands, as it were, for his employer could claim the automobile as exempt. I am not prepared to stretch the Act to such unreasonable lengths.

Has the motor vehicle become so important to the maintenance and support of the ordinary person that it should be recognized for exemption purposes as a basic necessity? It seems to us that anyone who has a motor vehicle would find it difficult to maintain economic and social viability without it. We are inclined to think that it should be characterized as a basic necessity, and that the present condition that the automobile be required for the debtor's employment be abandoned.

The effect of the present provision is to give the debtor who requires an automobile for employment considerably greater protection than one who does not, in that the former debtor will have the use of the motor vehicle both in employment and for purposes unconnected with employment. We think that all debtors should have the same degree of protection in this respect.

The present provision also imposes a monetary limit of $8000 on the exemption. We think that this level of exemption is too great for the motor vehicle "basic necessity" exemption. An automobile suitable for satisfying the basic transportation requirements of a debtor and family can be acquired for substantially less. We would alter the monetary limit to $5000.

Of course, where the debtor does require a motor vehicle that is worth more than $5000 in his or her work, it could still be exempt under the "tools of the trade" livelihood exemption, which we discuss below and for which we recommend a monetary limit of $10,000. A debtor would not be permitted, however, to add the basic necessity exemption to the livelihood exemption to protect a motor vehicle worth up to $13,000 because the proposed basic necessity exemption would protect a motor vehicle worth only $5000 or less.

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[456] *Exemptions Act*, s. 1(1)(f).

[457] (1983) 17 Alta. L.R. (2d) 399 at 400.

The monetary limit in this exemption has been interpreted as exempting only motor vehicles worth less than the monetary limit. If the vehicle is worth more, it is not exempt, and there is nothing requiring that the portion of the proceeds of the execution sale that equals the monetary limit be paid to the debtor.[458]

We do not think that this limitation of the exemption is appropriate. The purpose of the monetary limit is to ensure that the debtor does not frustrate his or her creditors by putting money into a more expensive car than is reasonably necessary to satisfy the basic transportation requirement. By permitting motor vehicles worth more than the monetary limit to be sold, the exemption provision encourages the debtor to be modest in the selection of a motor vehicle; however, by granting no exemption if the motor vehicle is worth more than the monetary limit, the provision deprives debtors of any opportunity to buy a more modest vehicle after a seizure has occurred. We think that whatever equity the debtor has in a motor vehicle, up to the monetary limit, should be exempt if the motor vehicle itself is not exempt.

We think also that the debtor's equity should be exempt in the debtor's hands for a period sufficient to permit the acquisition of alternative transportation. We think that 60 days is ample for that purpose. Again, the onus should be on the debtor to establish that any fund that he or she claims is exempt for this reason is indeed the exempt proceeds of the enforcement sale of the motor vehicle.

Of course, the debtor should not be able to claim an exemption for any portion of the proceeds of the sale of a seized motor vehicle unless it was the only motor vehicle owned. The debtor cannot be allowed to claim exemptions for both a motor vehicle and a portion of the proceeds of the sale of another motor vehicle.

The monetary limit in this exemption also should be subject to periodic adjustment for inflation by the process discussed later in this chapter.

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[458] *Re General Steel Wares Limited and Clarke* (1956) 20 W.W.R. 215 (Alta. D.C.). In *Public School Employee's Savings and Credit Union Limited v. Haluschak* (1964) 49 W.W.R. 504, Cormak, D.C.J. held that the automobile exemption was to be distinguished from the furniture exemption. The former exempted "an automobile valued at a sum not over one thousand five hundred dollars". The latter exempted "furniture . . . *to the value of* one thousand two hundred dollars". The latter wording rendered it clear that the first $1200 worth of furniture is exempt from seizure. The problem is not likely to arise in the context of furniture, however, because it is unlikely that the debtor would claim exemption for one piece of furniture or one household appliance that was worth more than $4000.

RECOMMENDATION 104:

MOTOR VEHICLE

There should be an exemption for a motor vehicle to the value of $5000. The provision should not require that the motor vehicle be needed by the debtor for employment or any other specified purpose. The provision should be so structured that, where the debtor's only motor vehicle is worth more than $5000, the debtor's equity up to $5000 should be paid to the debtor and should be exempt for 60 days provided that the debtor can establish that any fund for which such an exemption is claimed is indeed the exempt proceeds of the enforcement sale of the motor vehicle. The monetary limit of this exemption should be adjusted periodically in response to inflation.

(6) Other "Basic Necessities"

There are a few other exemptions that we think should be added to the basic necessities list.

Medical and Dental Aids

The first of these is medical and dental aids. Although the likelihood that a creditor would instruct the seizure of a debtor's wheelchair would seem small, we have been told of cases where this has happened. We would consider it uncontroversial that the reformed legislation provide exemption for such property. We adopt the statement of the Law Reform Commission of Ontario on the point:

> We also recommend the creation of a new exemption category for medical and dental aids and equipment ordinarily used by, and necessary for, the debtor or his family, with no monetary limit. The chattels in this category do not fit with the [existing] categories . . . and are often of critical importance to the persons concerned. No dollar maximum is warranted, since the Commission is of the view that a creditor never can be justified in seizing and selling such property, particularly in the light of the proposed restriction that it must ordinarily be used by, as well as necessary for, the debtor or his family.

RECOMMENDATION 105:

MEDICAL AND DENTAL EQUIPMENT

There should be an exemption for medical and dental aids and equipment necessary for the debtor and for the debtor's dependants, with no monetary limit.

Property of Sentimental Value

Occasionally, exemptions legislation provides exemption for a modest amount of property of purely sentimental value to the debtor. This kind of property is hardly within the class of basic necessities, but we expect that the rationale for such an exemption is that the removal of such property in enforcement proceedings would be heartless when its intrinsic value to the debtor is far greater than the amount that will be realized by the creditors.

For example, until recently the New Brunswick legislation included an exemption for articles and furniture necessary to the performance of religious services, and still provides for the exemption of dogs, cats and other domestic animals belonging to the debtor. Provisions exempting personal sentimental memorabilia can be found in United States exemption statutes as well.

We recommend the inclusion of such a provision in the reformed legislation. We think that it should be subject to a monetary limit of $500. The monetary limit, in this case, as well as all others, refers to the market value of the property for which the exemption is claimed. Again, this monetary limit should be adjusted periodically in response to inflation.

Obviously, it is inappropriate that, if property of sentimental value worth more than the monetary limit is seized, the proceeds up to the monetary limit be paid to the debtor. If the property is truly of sentimental value, it is irreplaceable, so payment of a portion of the proceeds would not advance the purpose of this particular exemption.

RECOMMENDATION 106:

PERSONAL SENTIMENTAL MEMORABILIA

There should be an exemption for personal sentimental memorabilia to a value of $500. The monetary limit should be adjusted periodically in response to inflation.

D. Protection of Property for Livelihood

The second category of exemptions includes those that protect the assets that the debtor requires for use in earning a livelihood. The category can be divided into two main subjects: exemptions designed specifically for farm debtors and exemptions intended for more general application. It will be convenient to consider the farm exemptions first.

(1) Farm Exemptions

As mentioned previously, it is clear throughout section 1 of the *Exemptions Act* that its designers had agriculture and farmers at the forefront of their minds. Half of the subsections of the section relate to farm operations. These provisions are of three kinds:

a. provisions that exempt farm produce sufficient to permit the farm debtor to pay his or her current and immediately foreseeable operational debts and taxes (s. 1(1)(c)(ii),(iii),(iv));

b. provisions that exempt specific property required for the carrying out of farm operations in the immediate future, including animals, equipment and seed grain (s. 1(1)(d) and (g)); and

c. provisions that exempt specific property required for the continuing farm operation, beyond the immediate future, including a tractor, a motor vehicle and 160 acres of land (s.(1)(e)(f)(j)).

We observed previously that the currency of the present provision is affected by being directed towards the protection of participants in one industry, particularly when the majority of the population are not involved in that industry and therefore derive no protection from the provisions. This observation does not lead us to the conclusion, however, that the specific protection for farm debtors should be removed.

It is true that, since the enactment of the provisions under review, significant changes in the Alberta economy have resulted in a decrease in the proportion of the population involved directly in the agriculture industry. Nevertheless, it would be inaccurate to conclude that the agriculture industry is not vital to the Alberta economy generally, or that those who participate in it, though now fewer in number, are not still in need of the protection afforded by the *Exemptions Act*.

We suggest, however, that it would be appropriate for the structure of the exemption provision to be redesigned so that the protection given to participants in this one industry is not the main focus. The provision should focus first on the protection afforded generally to all debtors and then on the protection afforded to particular classes of debtors.

As for the specific farm exemptions created by section 1, one might doubt the effectiveness of the first kind of exemption — exemptions of farm produce sufficient to produce cash to pay current and imminent operational costs and taxes. We expect that the intent of the provision is to ensure that the farmer's ability to obtain credit for his current operation is not impaired by enforcement activity. His future operations depend on his being able to pay those from whom he borrowed for his current operations.

The provision, however, protects the exempt property from the creditors who granted current operational credit as well as other creditors, and therefore it does not ensure that the current suppliers will be paid. One might think that a preference for the creditors who are essential to the farmer's current operations would better serve the purpose; however, in practice, it is probable that the farmer's desire to secure further credit will be enough to ensure that he uses the exempt property to meet the debts and expenses for which it was exempted. The use of the exemptions provision to establish a preference also avoids any difficulty of ranking creditors within the preference structure. We think that the provision should be continued.

One might also question the suitability of the property described in the other two kinds of farm exemptions. Are they appropriate for modern farm operations? When we asked these questions in our 1978 Working Paper, those who responded did not think that the descriptions of the property required for a farm operation were out of date. Some questioned the size of the exempted "homestead", pointing out that 160 acres of land is grossly insufficient for some farming operations and more than sufficient for others; others said that 160 acres was appropriate.

We do not purport to have done the consultation, study or research necessary to conclude that the present exemptions are tailored to the needs of the industry as well as they might be. Unfortunately, it is beyond the resources available to this project to undertake the close examination of the role and function of credit in the agriculture industry necessary to support such reform recommendations. We invite opinion as to whether or not a study of this subject would be worthwhile in the future.

We do recommend, however, two changes to the substance of the farm exemptions. First, the "tractor" exemption appears to be redundant. The farm debtor is given an exemption for "farm machinery" and "farm equipment" required for the conduct of the farm operations in the next 12 months.[459] Surely that description is general enough to include "one tractor, if it is required by the execution debtor for agricultural purposes". The only limitation that the more general provision imposes is that the tractor be required in the next 12 months. We think that limitation should apply. If a tractor is superfluous to the farm debtor's prospective needs for that period, it should not be exempt. Second, to remove any doubt that might arise out of the removal of the "tractor" exemption, the general farm equipment exemption should be expanded expressly to include "farm vehicles". This latter addition should also allay any fear that the substitution of the basic necessity motor vehicle exemption for the motor vehicle "required for agricultural purposes"[460] exemption would decrease the level of exemptions afforded to farm debtors.

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[459] *Exemptions Act*, s. 1(1)(d).

Other than those specific changes, we recommend only a modest renovation to the organization of the farm exemptions.

RECOMMENDATION 107:

FARM EXEMPTIONS

The present exemptions giving specific protection to farm debtors should be continued, but they should not be the central focus of the reformed exemptions provision. The reformed exemptions provision should be arranged so that exemptions generally available for all debtors are given primary focus.

The exemption of "one tractor" should be abolished since it is redundant to the general exemption of "farm machinery" and "farm equipment". To forestall any restrictive interpretation of the general provision on the basis that there was once but is no more a specific tractor exemption, the general exemption should be expanded to include "farm vehicles".

(2) General Livelihood Exemptions

Other than those that are specific to farm debtors, the present exemptions structure creates four exemptions that serve the purpose of protecting the debtor's means of earning a livelihood. These are:

a. a tractor if required in the debtor's trade or calling (s. 1(1)(e));

b. an automobile (monetary limit of $8000) or motor truck required for the debtor in his trade or calling (s. 1(1)(f));

c. the books of a professional person required in that person's profession (s. 1(1)(h)); and

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[460] *Ibid*. s. 1(1)(f).

d. the necessary tools, implements and equipment used by the debtor in his trade or profession, with a monetary limit of $7500 (s. 1(1)(i)).

The tractor exemption is curious. As we observed above in the farm exemption context, it is redundant since the general exemption of "farm machinery" and "farm implements" covers a tractor. In the general "livelihood" context, it is curious because there are few occupations that involve the use of this specific piece of equipment. We think that it is inappropriate that the few debtors who own a tractor for use in a non-farm occupation should receive this special treatment. The "tractor" exemption should be abolished.

As for the automobile or truck exemption, we recommended previously that the motor vehicle be recognized as a basic necessity for the purposes of exemptions from enforcement and that the present qualification that the vehicle be required in the debtor's trade or calling be abolished.[461] Of course, the debtor might wish to protect a second motor vehicle under the reformed "tools of the trade" exemption proposed below.

We think that the "books of a professional person" exemption should be covered by the "general tools of the trade" exemption. For most professions, books that it might be worthwhile to seize are not an important part of the equipment necessary for carrying on the profession. Where books are important, we see no reason why they should have a special status.

As for the remaining "livelihood" exemption, the "tools of the trade" exemption, we would recommend several changes to the wording.

First, we propose that the description of those persons to whom the exemption is granted be broadened. There have been several cases where a restrictive interpretation has been given to the words "trade or profession" and similar words in exemptions statutes. It has been held that a labourer is not engaged in a "trade or calling",[462] and that "trade" is not ". . . to be construed as synonymous with or meaning "business" but rather denotes the occupation of one who falls within the mechanic, craftsman or artisan group".[463] We can see no justification for these distinctions. There should be no restriction on the availability of the general livelihood exemptions dependant upon the manner in which the livelihood is earned. The present words should be replaced by the broader expression, "occupation".

Second, we think that the expression "necessary tools, implements and equipment" is unnecessarily restrictive. A more general formulation is desirable, and we propose that the exemption apply to any personal property required by the debtor in his or her occupation.

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[461] See Recommendation 104, *supra*, at 277.

[462] *Canadian Acceptance Corporation v. Laviolette* (1981) 11 Sask. R. 121 (Q.B.).

[463] 13 C.E.D. Western, Title 59 Execution, § 121.

As we have suggested the amalgamation of a few overlapping livelihood exemptions into one exemption, and since it would now be necessary for a debtor who required both a motor vehicle and other tools for his or her work to bring them within the monetary limit of this one exemption, we think that the monetary limit should be increased so that the net effect of these changes may be as neutral as possible. We think that a monetary limit of $10,000 would be appropriate. We would subject this limit, like the other monetary limits discussed previously, to the process for periodic adjustment for inflation.

The net effect of our recommendations relating to the general livelihood exemptions is that the existing four exemptions be replaced by one exemption of the personal property required by the debtor in his or her occupation to a maximum value of $10,000. For some debtors, this might be a net reduction of exemptions. For example, the motor truck of a debtor who requires it in his or her occupation is at present totally exempt, regardless of its value. Under our proposal, only $10,000 of its value would be exempt. Given the value of heavy trucks, our proposal constitutes a significant reduction in the exemptions of debtor truck owner/drivers. We think that it is inappropriate, however, that the exemption provisions should treat truckers differently than debtors involved in any other occupation. Since it is impossible to tailor the exemption provisions to the capital needs of each individual occupation, the policy should be that a certain level of capital is protected for everyone, regardless of the occupation in which they are engaged.

We think also that it is appropriate in this context, as it was in the case of the urban house, the mobile home and the motor vehicle exemptions, that, if the article chosen by the debtor in this exempt class is worth more than the monetary limit and is accordingly sold, $10,000 of the proceeds of the sale should be paid to the debtor and be exempt for a period sufficient to permit the acquisition of a less valuable substitute. Again, we think that the appropriate period is 60 days. If the debtor protected a group of assets under this exemption, and their value exceeded the monetary limit, it would be necessary for one to be sold and the amount of the proceeds that represented the unused portion of the exemption to be paid to the debtor. If the apportionment could not be agreed to, it would be necessary that an application be taken to establish it.

RECOMMENDATION 108:

GENERAL LIVELIHOOD EXEMPTIONS

There should be one general livelihood exemption of such personal property as the debtor requires in his or her occupation to a maximum value of $10,000.

The present "tractor", "motor vehicle required in the debtor's trade or calling" and "books of a professional person" exemptions should be abolished.

The monetary limit of $10,000 should be adjusted periodically in response to inflation.

If one item is selected by the debtor for this exemption and it is worth more than $10,000, the item should be sold, but $10,000 of the proceeds should be paid to the debtor and should be exempt for a period of 60 days. If the exemption is claimed for a group of assets, the total value of which exceeds the monetary limit, some part of the group should be sold and the amount of the proceeds representing the unused portion of the exemption should be paid to the debtor on the same basis.

E. Protection of Income

The third category of exemption in the existing structure is exemption of a portion of the debtor's income from employment.

Throughout this project, we have on several occasions given consideration to the question of whether or not the protection of the debtor's wages should be absolute — whether or not wage garnishment should be abolished. We addressed the question in a 1978 working paper[464] and in our Report for Discussion.[465] In the latter, we concluded that wage garnishment should be retained as a remedy for unsecured judgment creditors. As noted in the chapter of this report dealing with garnishment, that conclusion did not engender any dissent among those who responded, and we have not seen any reason to change our conclusion. Our recommendation to that effect is contained in Chapter 7 of this report.

We believe also, however, that significant reform of the exemptions structure as it relates to wage garnishment is desirable.

(1) Policy of Wage Exemption

The general policy of exemptions is easily adapted to a more specific policy applicable in the context of wage exemptions. Enough of the debtor's wages should be exempt from wage garnishment to provide the debtor and family with the means of subsistence and to permit the debtor to continue as a productive member of society. This policy competes with the policy that the exemption should not prevent wage garnishment from being an efficient and effective means of debt collection. A third consideration is that the exemption must be designed to minimize the burden on the debtor's employer when complying with the obligation as garnishee.

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[464] Institute of Law Research and Reform, Working Paper, *Exemptions from Execution and Wage Garnishment* (1978, unpublished) [hereinafter *Exemptions*].

[465] Report for Discussion, *supra*, note 4 at 331.

(2) Alternative Structures

What form should the wage exemption provision take? There are at least three main alternatives to consider.

Prescribed Amounts

The present wage exemption provision[466] sets the amount of the debtor's monthly earnings that the garnishee employer is to pay to the debtor notwithstanding the garnishment. The amount of the exemption varies according to the number of dependants (spouse and children) the debtor has. The employer is instructed to use a proportionate figure if the relevant pay period is something other than a month, but a debtor who is employed for part of a month is nevertheless entitled to the full monthly exemption. The obvious deficiency of this structure is the problem of obsolescence. The prescribed amounts go out of date quickly because of inflation.

Discretionary Amount

In some jurisdictions, England for example, a court or court official establishes the exemption in each case. The exemption established by the court, unlike the prescribed amount exemption, is tailored to the circumstances of the individual debtor.[467] As noted previously, this is the kind of exemption provided by the *Bankruptcy Act*.[468] The wage exemption established under the *Maintenance Enforcement Act* contemplates the debtor or the director of maintenance enforcement applying to the court to increase or decrease the amount of the exemption established by the regulation.[469]

The obvious difficulty with this structure is the administrative burden that it would impose on the court system. The officer who sets the exemption must be provided with, and take time to consider, information and representations about the debtor sufficient for him to determine the appropriate exemption. The process would be unacceptably expensive in both time and money.

We note that even in the bankruptcy system the avoidance of court applications to determine the amount bankrupts must contribute from their income (and the amount that will be exempt) is encouraged. Bankruptcy trustees are instructed to request that bankrupts voluntarily pay a portion of their earnings to be used in satisfaction of their debts, and guidelines as to the appropriate amount for bankrupts to pay, taking into account income levels and dependants, are provided.[470]

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[466] Rule 483.

[467] 16 Halsbury's Laws of England (4th) at §§ 813, 814.

[468] R.S.C. 1985, c. B-3, s. 68.

[469] *Maintenance Enforcement Act Regulations*, Alberta Regulation 2/86, s. 13.

Percentage Exemptions

Another approach, taken in at least three Canadian jurisdictions, is to exempt a certain percentage of the debtor's wages.[471] In British Columbia and in Manitoba there is a legislated exemption of 70% of the debtor's wages. In Ontario, the Ontario Law Reform Commission recommended that the percentage be increased from 70% to 85%, and the Legislature raised it to 80%.[472] The approach has also been followed in the exemption provisions applicable to the *Maintenance Enforcement Act*.[473]

The percentage exemption has two main advantages over the prescribed amount exemption. First, inflation would not be a problem. As wages rise to cover inflation, so would the exemption yielded by the percentage.

In the context of specified property exemptions, we have recommended that monetary limits be adjusted periodically to account for inflation by a process discussed later in this chapter. A periodic adjustment does not completely eliminate the inflation problem, however. It simply ensures that there will be a response to inflation before the amount of the exemption loses all touch with economic reality.

The percentage exemption is clearly a superior response to inflation. No government action of any kind is required. On this ground alone, we consider the percentage exemption to be far superior to the prescribed amount exemption and a prescribed amount exemption subject to a periodic inflation adjustment.

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[470] Houlden and Morawetz, *Bankruptcy Law of Canada*, Vol. 2, (Toronto: Carswell 1984, at 51-71).

[471] *Garnishment Act*, R.S.M. c. G-20, s. 6; *Wages Act*, R.S.O. 1980, c. 526, s. 7; *Court Order Enforcement Act*, R.S.B.C. 1979, c. 75, s. 4.

[472] *Wages Act*, R.S.O. 1980, c. 526, s. 7, was amended in 1983 by S.O. 1983, c. 68, s. 1.

[473] Alberta Regulation 2/86, s. 13 provides:

> If the money bound under a notice of continuing attachment is owing or payable as wages or salary, the sum of $525 plus 30% of that part of the net wages or salary that exceeds $525 is exempt from attachment during each month.

The second advantage of the percentage exemption over the prescribed amount exemption is that the debtor would keep a portion of each dollar earned. With the prescribed amount exemption, after the debtor has earned that amount he or she is working solely for the benefit of creditors. With the percentage exemption, the debtor is entitled to keep a portion of each dollar earned, and there is therefore a greater incentive to continue earning and to maximize earnings. This incentive to continue to earn would be extremely important to the effectiveness of the system of continuing wage garnishment that we recommended previously in this report.

We think that the percentage exemption is clearly the superior alternative.

Several other issues arise for consideration if a percentage exemption is adopted. What should the percentage be? Should the percent exemption be calculated on the debtor's gross or net earnings? Is a minimum prescribed amount exemption required to protect the debtor whose income is so low that taking any of it by garnishment would leave insufficient income for subsistence? Is a maximum limit required where the debtor's income is so great that he or she does not reasonably require as much as the percentage exemption allows?

We have considered each of these issues, and we present our conclusions below. We believe that not one provides any reason for us to alter our conclusion that the percentage exemption is the preferred approach.

RECOMMENDATION 109:

PERCENTAGE EXEMPTION

The amount of a debtor's wages exempt from enforcement should be determined on a percentage basis.

(3) Percentage of What?

Before talking about the appropriate level of the percentage exemption or the amount of any possible minimum or maximum exemption, it is necessary to determine the base from which the necessary calculations will be made. Should the base from which exemptions are calculated be the debtor's gross employment earnings, ignoring any deductions made by the employer? Should the base be the debtor's "take-home" pay, the amount that appears on the paycheque or that is deposited into the debtor's account? Or should it be something in between the two?

The basic purpose of the employment earnings exemption is to allow enforcement debtors' sufficient income to provide themselves and their dependants with food, shelter and other "necessities". What goods and services should count as necessities and how much money an enforcement debtor should be allowed for them are matters that can be debated endlessly. What is not debateable is that the portion of salary that is withheld by the employer for income tax, Canada Pension Plan contributions and workers' compensation, Alberta Health Care and unemployment insurance premiums is not available for the purchase of "necessities", however they are defined and whatever they cost. It seems to make sense, therefore, to subtract the amount withheld for these statutory deductions from enforcement debtors' gross earnings to get the base figure from which the exempt and non-exempt portion of their earnings are calculated. This would be consistent with the approach taken by other provinces that have adopted percentage exemptions.[474]

Of course, many employees have other amounts deducted from their gross earnings in the calculation of their take-home pay. The possibilities are endless, but could include payments on group insurance plans, stock purchase plans, RRSPs, savings bonds, parking, club dues, union dues, professional association dues, dental plans, and so on. Some of these deductions are voluntary and directly benefit the employee. Others are more or less involuntary and may be of limited direct benefit to the employee.

We think it is fairly obvious that voluntary deductions from enforcement debtors' paycheques should not be deducted from their gross earnings to establish the base from which exemptions are calculated. Such deductions generally represent a direct benefit to the enforcement debtor. In any event, they could be received as cash if the debtor so desired.

Some employees incur deductions that are not directly required by statute, but which are more or less involuntary. Some of these deductions, such as union dues or charges for parking, are work expenses; the amount deducted could not be used instead for the purchase of necessities. In that respect, they are similar to the basic statutory deductions. However, beyond the basic statutory deductions there is no consistency in the involuntary deductions that different enforcement debtors may incur. Moreover, apart from deductions that are required by legislation, the line between voluntary and involuntary deductions is rather fuzzy. Therefore, in the interest of consistency and simplicity, we propose that only the basic statutory deductions be subtracted from enforcement debtors' gross earnings to arrive at the base from which exemptions are calculated. This base will give a reasonably accurate picture of what income is actually available to the debtor for the purpose of paying for food, shelter and other necessities.

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[474] We noted earlier that British Columbia, Manitoba, and Ontario all provide percentage exemptions for wage garnishment: see *supra*, at note 471. In each case, the percentage exemption is calculated on the basis of the debtor's wages net of statutory deductions. Section 7(1) of Ontario's *Wages Act* provides that "wages" does not include "an amount that an employer is required by law to deduct from wages". Section 1 of British Columbia's *Court Order Enforcement Act* excludes "deductions from wages made by an employer under an Act of the Legislature of any province or the Parliament of Canada". Manitoba's definition is virtually identical to British Columbia's.

RECOMMENDATION 110:

CALCULATION ON NET INCOME

The percentage exemption should be calculated on the debtor's gross employment earnings, minus the basic statutory deductions: income tax; Canada Pension Plan contributions; unemployment insurance premiums; Alberta Health care premiums; and workers' compensation premiums.

(4) Minimum Exemption

We think that there should continue to be a minimum exemption to protect the debtor whose income is so low that taking any of it for creditors would leave insufficient income for subsistence. If there were no minimum, there would be instances where a percentage exemption would leave the debtor without the means of subsistence and unable to continue as a productive member of society. Unless the debtor had other income or liquid assets, which would not be likely if the earned income was low, the choice would be between social assistance and bankruptcy, and the debtor and his or her family could suffer great hardship.

Alberta law now provides a minimum exemption[475] (which is also a maximum). Although it was established by regulation and not by the Legislature, we do not doubt that it embodies the public policy of Alberta. We see no basis for suggesting that the public policy of Alberta should be changed so as to deprive low-income debtors of the minimum protection that the law now provides.

The Ontario Commission decided against a minimum:

> The Commission has dismissed the possibility of a fixed dollar minimum exemption, since it would suffer from the same fundamental deficiency as a flat dollar exemption; that is, it would be subject to the ravages of inflation.[476]

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[475] Rule 483.

[476] OLRC Part 2, *supra*, note 57 at 166.

We acknowledge this deficiency. It is one of the main reasons that we have recommended against continuation of the present prescribed amount exemption; however, we are not inclined to reject the idea of a minimum exemption because of it. Is it not better that debtors have imperfect protection than no protection at all? We think that the better approach is to provide for regular review of the minimum exemption to deal with the effects of inflation. We discuss the mechanics of such a review later in this chapter.

What should the minimum exemption be? We can not pretend to have found a magic formula that will allow us to answer this question in some objectively correct fashion. We can, however, refer to several useful points of reference.

An initial reference point is provided by the minimum wage rate established by regulation under the *Employment Standards Code*.[477] Assuming a working month of 22 eight-hour days, a person earning the present minimum wage would have a gross monthly income of $792. The minimum wage level has been criticized on the basis that it represents an income level that is well below the poverty line.[478] On the other hand, it is well above the present wage exemption of $525 for an unattached individual.

The poverty line itself provides another useful point of reference. Actually, we should say "poverty lines". Various organizations estimate poverty lines, and any given poverty line will reflect the assumptions and methodology of its author. Another point to keep in mind is that although all of the poverty lines we mention below pay some attention to the cost of purchasing food, shelter and other basic necessities, none are based solely on that criterion. Nevertheless, these poverty lines do serve their purpose as points of reference.

One set of poverty lines is based on a report issued 20 years ago by a special committee of the Senate.[479] For 1987, the last year for which figures are

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[477] The last regulation was effective September 1, 1988, and set the minimum wage at $4.50 per hour. Alberta Regulation 220/88.

[478] See National Council of Welfare, *1989 Poverty Lines* (Ottawa: NCW, 1989), at 6.

[479] *Poverty in Canada: Report of the Special Senate Committee on Poverty* (Ottawa: Information Canada, 1984), Appendix [hereinafter Senate Committee]. The committee's main recommendation was the adoption of a guaranteed annual income for all Canadians. The poverty lines were developed to facilitate this recommendation.

The committee concluded that $3500 per year should be adopted as the initial guaranteed annual income for a family of four. This represented 70% of the committee's estimate of the poverty line for a family of four in 1969, and was considered to be the amount that such a family would

(continued...)

available, the Senate committee poverty line for an unattached individual was $780 per month. Another estimate of poverty lines is that of the National Council of Welfare.[480] The Council's estimate of the 1989 poverty line for an unattached individual in a community of more than 500,000 people was $12,037 per year or $1003 per month. For an unattached individual in a rural community, it was $8901 per year or $741 per month.[481] The final set of poverty lines we shall refer to are based on a formula adopted by the Canadian Council on Social Development.[482] The National Council of Welfare estimated that this formula would produce a 1989 poverty line for unattached individuals of $11,800 per year or $983 per month.[483] With the exception of the Senate committee's figure, all of the preceding figures are based on gross earnings.

Having considered these points of reference, we think that an appropriate minimum exemption for a debtor with no dependants would be $800 a month, using 1990 as a base year. Keeping in mind that the minimum of $800 would be based on net pay, and that the poverty lines exceed estimates of the amount required to purchase basic necessities, $800 seems to bear a reasonable relationship to these indices.

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[479](...continued)
require to purchase basic necessities. Figures for family units of different sizes were derived from this figure.

The committee provided a formula for yearly revision of the poverty lines. The committee stressed that poverty is a relative concept, so its formula is based on increases in average disposable family income, rather than on increases in the price of basic necessities. Therefore, the committee's formula results in a steeper rise in the poverty line from year to year than would a formula tied to the Consumer Price Index. The committee's forumula produces the 1987 figure of $780 mentioned in the text.

[480] *1989 Poverty Lines, supra*, note 478.

[481] *Ibid.* at 9. The Council's estimates are extrapolations of Statistics Canada's "low income cut-offs" from previous years. The low income cut-off is defined as the income level at which 58.5% of income is required for basic necessities of food, shelter and clothing. 58.5% is 20 percentage points above the percentage of income that the average Canadian family spends on these items.

[482] Canadian Council on Social Development, *Not Enough: The Meaning and Measurement of Poverty in Canada* (Ottawa: CCSD, 1984) at 42, 69, cited in *1989 Poverty Lines, supra*, note 478 at 4, note 6. The CCSD's poverty line is set at one half of average family income.

[483] *1989 Poverty Lines, ibid.*

Obviously, the minimum exemption should increase as the size of the family unit increases. There is a method of adjustment for family unit size that is used by several low-income indices. It was used by the Senate Committee[484] and is still used by the Canadian Council on Social Development. A weighting is applied on the following basis:

Family unit size	*Weighting*
1	3
2	5
3	6
4	7
5	8
6	9

One further unit is added for each additional dependant beyond six.

We propose the adoption of this system for determining the minimum exemption for a debtor with dependants. Applying this weighting system to the minimum exemption that we propose, $800, each weighting unit has a value of $266. The following minimum exemptions result:

Number of dependants	*Weight*	*Minimum exemption*
0	3	800
1	5	1330
2	6	1596
3	7	1862
4	8	2128
5	9	2394

The minimum exemption for a debtor with no dependants should be subject to periodic review and adjustment for inflation, and if it is altered the minimum exemptions for debtors with various numbers of dependants should be adjusted according to the weighting formula described above. We discuss the process for the adjustment of the minimum exemption later in this chapter.

For the purposes of these exemptions, "dependant" should be defined in the same way as it is for income tax purposes, except that it should include a spouse who is being supported by the debtor. Obviously, it must be as simple as possible for the employer to determine how many "dependants" an employee has. The "TD1" (or equivalent) form that employees must complete for use by employers in determining the amount of income tax to withhold from wage payments will disclose the number of dependants that the debtor has and whether he or she is supporting a spouse. We think that the employer should be able to rely on this document. For exemption purposes, we think that the spouse should be regarded as a dependant if the debtor has claimed any amount for a "supported" spouse on the TD1 or equivalent form.[485]

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[484] *Supra*, note 479 at 208-09, 211.

Rule 484 allows a creditor to apply to the court to reduce the exemption available to one or both of two spouses who both have employment earnings. Under the proposal advanced in the preceding paragraph, a spouse who has anything more than a very modest income is not counted as a dependant of the debtor for garnishment exemption purposes. This would achieve the main purpose of Rule 484 without the need for a court application. There might still be circumstances, however, where it would be appropriate for the court to have a discretion to reduce the minimum exemption to reflect earnings of an enforcement debtor's spouse. Thus, we would retain a provision similar to Rule 484.

RECOMMENDATION 111:

MINIMUM EXEMPTION

There should be a minimum wage exemption. The wages of debtors who earn the minimum or less should be completely exempt from enforcement. The minimum monthly exemption should be $800 for a debtor without dependants. The minimum should increase according to a weighting formula, where the minimum for a debtor with no dependants is weighted as 3, a debtor with one dependant is weighted as 5 (minimum exemption 1330), a debtor with two dependants is weighted as 6 (minimum exemption 1596), and thereafter each additional dependant adds one weighting unit.

The minimum exemption for a debtor with no dependants should be subject to periodic review and adjustment for inflation, and if it is altered the minimum exemptions for debtors with various numbers of dependants should be adjusted according to the weighting formula described above.

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[485] At the moment, a claim for a supported spouse results in a non-refundable tax credit. For 1990, no tax credit is claimable for a spouse who earns more than $5655 in the year. Such a spouse would not count as a dependant for the purposes of the proposed wage garnishment exemption.

The employer should rely on information supplied by the debtor in the TD1 (or equivalent) form filed with the employer to determine the number of dependants to use in the calculations. The debtor's spouse should be regarded as a dependant if the debtor has claimed any amount for a "supported" spouse on the that form.

The creditor should continue to have the right to apply for a reduction of the amount of the exemption to reflect earnings of the debtor's spouse.

(5) The Percentage

What percentage of the debtor's wages should be exempt from enforcement? Obviously, the goal is to set a percentage that is high enough to enable the debtor to survive, but low enough that wage garnishment continues to be an effective and efficient means of debt collection.

We think that the present wage exemption levels established by Rule 483 are grossly inadequate. They permit an unmarried debtor an exemption of $525 per month. A married debtor can keep $700, plus $140 for each child. These figures are significantly less than any of the poverty lines referred to earlier. We think that they are so low that the debtor would have no incentive to keep working. If it was feasible, the debtor might be encouraged to declare bankruptcy simply to obtain the benefit of the more generous wage exemptions available under that system. We do not think that the level of available exemptions between the two systems should be so different as to be a factor in the determination of whether a debtor goes into bankruptcy. We do not think that the level of the present fixed exemptions provides any useful starting point for determination of the appropriate percentage.

We noted above that in Manitoba and in British Columbia the percentage has been set at 70%. In Ontario, it was raised from 70% to 80% in response to an Ontario Law Reform Commission recommendation. The Ontario commission noted that, in the United States, the *Consumer Credit Protection Act* provides a 75% exemption, and that in states where a similar formula has been adopted the exemption ranges from 75% to 87.5%. Of course, in these jurisdictions, there is no minimum exemption. Given our proposed minimum exemption, the appropriate percentage for use in the system that we recommend will be lower than that used in these jurisdictions because the exemption will be a percentage of the income in excess of the minimum.

It would seem clear that a person with a lower income reasonably requires a greater proportion of that income than a person with a greater income. This truth is recognized in the bankruptcy system of wage attachment. As mentioned previously, the Superintendent of Bankruptcy has issued guidelines to bankruptcy trustees for use in determining the proportion of bankrupts' income that they should be asked to pay to the trustee. The guidelines suggest that one half of all income above the Senate Committee Poverty Lines be paid.[486] If these guidelines are converted to a percentage income exemption, it appears that the exemption for a bankrupt with no dependants and a modest income ranges from 89% to 74%.[487] The exemption for a bankrupt who earns just more than the poverty level and who has six dependants is 96%.

We have not recommended the use of a sliding scale for enforcement exemptions for fear that the calculations required would thereby become too complicated. The effectiveness of garnishment, and especially continuing garnishment, depends on the co-operation of the debtor's employer. The system must be as simple as possible to operate. In any event, the combination of a minimum exemption and an exemption of a percentage of amounts over the minimum (up to a maximum) provides a built-in sliding scale.

We consider it significant to this question also that, in the reformed garnishment system that we have recommended, wage garnishment would usually be a continuing garnishment. This would argue for a higher exemption, because the debtor might require an incentive to continue earning and the creditor will receive a steady stream of funds. As there will be a series of payments produced by one garnishment, it is perhaps acceptable that each payment be smaller.

A competing consideration is that the amount of the exemption cannot be so large that wage garnishment is no longer a useful remedy. We have recommended the continuation of the wage garnishment process, and it is not our intention that it should be abolished by the exemptions applicable to it.

Given that we believe that there should be a minimum exemption, as discussed above, we think that it is appropriate that the percentage exemption be calculated on the portion of the debtor's income that exceeds the minimum exemption. We believe that the various considerations are balanced appropriately if the exemption is fixed at 50% of income in excess of the minimum exemption.

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[486] Except where income exceeds 150% of the relevant poverty level in which case the greater of all income in excess of 150% or 50% of the income in excess of the poverty level is to be paid.

[487] Where the income level is high, the recommended exemption goes as low as 40%.

RECOMMENDATION 112:

APPROPRIATE PERCENTAGE

The percentage for the percentage exemption should be 50% of the debtor's earnings in excess of the minimum exemption.

(6) Maximum Exemption

Is a maximum limit required where the debtor's income is so great that he or she does not reasonably require as much as the percentage exemption allows? For example, should an executive whose net income is $100,000 per year close to $75,000 under the percentage exemption that we recommend? Most people would consider this to be too generous, especially when it is compared to the minimum exemption that we have been discussing.

Accordingly, we think that there should be a maximum exemption. If the debtor's income is greater than the maximum, the amount in excess of the maximum should not be exempt.

In suggesting a level of maximum exemptions, we have considered the Superintendent of Bankruptcy Guidelines mentioned previously which suggest that the trustee consider requiring payment of that income that is in excess of 1.5 times the Superintendent Poverty Lines used to determine the minimum exemption applicable in bankruptcy.[488] On that basis, and using the 1989 figures, a bankrupt with no dependants would be required to pay all his or her monthly income in excess of $2266.50.

We consider that an appropriate maximum, and one that is roughly equivalent to that suggested to bankruptcy trustees, would be triple the minimum for a debtor without dependants. The figures produced by using that factor seem to establish a reasonable maximum level of income.

For a debtor with no dependants, the maximum exemption would be $2400 per month. The difference between the maximum should be constant regardless of the number of dependants. Accordingly, whereas the minimum for a debtor with no dependants is $800 and the maximum is $2400, the maximums for debtors with various numbers of dependants should be $1600 more than the appropriate minimum.

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[488] The Superintendent Poverty Lines ("SPL") are 10% higher than the maximum of the low income cut-offs established by Statistics Canada. The minimum exemption is 150% of the SPL. Consumer and Corporate Affairs Canada, Superintendent of Bankruptcy, Directive No. 17R, issued December 15, 1988.

Number of dependants	*Minimum exemption*	*Maximum exemption*
0	800	2400
1	1330	2930
2	1596	3196
3	1862	3462
4	2128	3728
5	2394	3994

RECOMMENDATION 113:

MAXIMUM EXEMPTION

There should be a maximum exemption of triple the amount of the minimum exemption for a debtor without dependants, and the difference between the minimum and maximum exemptions should be constant, regardless of the number of dependants.

(7) Portions of a Month

Rule 483(2) provides that "the amount of exemption applicable is increased or decreased proportionately where the period in respect of which the wages or salary is payable is greater or less than one month". Of course, such a provision is unnecessary for the determination of the exemption when a percentage exemption is used; however, it is still required for determining the minimum and maximum exemptions applicable when the period in question is greater or less than a month.

It appears that Rule 483(2) is intended to apply where the debtor works for an entire month but the garnishment has captured the wages for only a part of that month. Where the debtor has worked for only part of a month, the exemption is not to be decreased proportionately. Rule 483(3) provides that, "if the debtor is employed during part only of a month, he is entitled to the full exemption for the month". We think that this provision is appropriate. The intention is to ensure that the debtor has at least the amount of the exemption left to him or her for the month. It should make no difference whether he or she worked full time, part time, or only for part of the month to obtain the income out of which the exemption is preserved. Under our proposals, the minimum and maximum provisions should apply in full even though the debtor is employed only during part of a month.

RECOMMENDATION 114:

PROPORTIONAL ADJUSTMENT OF MAXIMUM AND MINIMUM EXEMPTIONS FOR PORTIONS OF A MONTH

The amount of the maximum and minimum exemptions should be increased or decreased proportionately where the period for which the wages or salary is payable is greater or less than one month, assuming that the debtor has earned income for the whole month. If the debtor is employed only during part of a month, however, the full maximum and minimum exemptions should apply.

(8) Garnishee's Calculations

We do not think that the great improvement in the fairness of the wage exemption that we believe our recommendations would achieve would introduce significantly greater complexity for garnishees than they already are required to cope with.[489] In fact, we are convinced that the information sent to garnishees could be improved vastly to reduce the complexity of the calculations to be performed. We believe that a "Return Form" could be developed for use by the garnishee in calculating the exemption to be paid to the employee and the amount to be paid to the sheriff. The kind of form that we have in mind appears at the end of this chapter.

(9) Scope of Exemption

It has been suggested that the income exemption should not be limited to income from employment but should extend to income from property as well. The Ontario Law Reform Commission recommended that exemptions should apply to all forms of income receipts, not just income from employment. The Commission observed that if the exemption was limited to employment income:

> . . . those in receipt of other forms of income, such as income from property, would not have the benefit of

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[489] We asked the Ontario Law Reform Commission if the percentage exemption used in that jurisdiction had created administrative problems. We were advised that it does not seem to have been a problem for employers to determine the appropriate exemption when the wages of an employee are garnished. It was observed that, in the few cases where the employer does not comply with the exemption provision, an injustice can occur because ". . . sheriffs do not, in practice, scrutinize the payments made by garnishees to their offices": Letter from M.A. Springman to the Institute (March 1, 1990).

> any garnishment exemption, even though they might be just as dependent on their income for their livelihood as individuals in receipt of "employment income".

We disagree. We think that it is appropriate that the exemptions system protect only income from employment. The exemptions system should protect the debtor's present and future ability to acquire the basic necessities through the marketing or other application of his or her personal resources and talents. If the debtor owns capital resources that produce income, we think that it is appropriate that he or she be expected to use those capital resources to satisfy creditors. We do not consider this to be unreasonably harsh. Moreover, it would be inconsistent to protect income from capital property but to facilitate enforcement against the capital property itself.

We do think, however, that the present provision in limiting the scope of the exemption to cases "where the debt due to an employee is for wages or salary" might not be broad enough. That definition might not include such things as commissions earned by a real estate agent, or payments made by a taxi company to a driver who is technically an independent contractor but otherwise in much the same position as an employee who works for wages. These possible exclusions would be eliminated if a definition of wages similar to that used in the *Employment Standards Code* was adapted for this application. That act defines wages as including "salary, pay, commission or remuneration for work, however computed . . .".[490] The definition goes on to exclude several forms of payment from "wages", only one of which, "expenses or an allowance provided in place of expenses", should be excluded for enforcement exemption purposes.[491]

RECOMMENDATION 115:

SCOPE OF EXEMPTION

The exemption should not apply to income from property. It should apply only to income from

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[490] *Employment Standards Code*, s. 1(s).

[491] The other listed items are:

i. overtime pay;
ii. "entitlements", which are defined as vacation pay, general holiday pay, and pay in place of notice of termination of employment;
iii. a payment made as a gift or bonus that is dependent on the discretion of an employer and that is not related to hours of work, production or efficiency; and
iv. tips or other gratuities.

employment, which might be defined as including wages, salary, commissions or remuneration for work, however computed.

F. Protection of Future Security

Should there be a fourth general category of exemptions? Should property relating to the debtor's future security, such as a retirement savings fund, a life insurance policy or pension funds, be exempt from enforcement?

At present, these kinds of assets have a measure of protection either unintentionally, because they are not vested in the debtor and therefore cannot be reached, or through deliberate legislation.[492] It cannot be said, however, that a general policy has been adopted in this area.

The justification offered for this potential class of exemption is that society encourages planning for the future and the taking of steps to ensure that one will have a reasonable income in retirement. Indeed, by giving the debtor tax relief for putting aside money for the future, society has not only encouraged the debtor but also has made a financial investment in the debtor's future security.

Making arrangements for a financially secure retirement might be considered a basic responsibility, and one that is encouraged by society. Where a debtor has met that basic responsibility, society should protect the steps taken from enforcement processes. It is as much in society's interest that the debtor not become a *future* burden on society by reason of creditor enforcement activities as it is that he or she not become a present burden.

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[492] *Insurance Act*, s. 265:

> (1) When a beneficiary is designated, the insurance money, from the time of the happening of the event on which the insurance money becomes payable, is not part of the estate of the insured and is not subject to the claims of the creditors of the insured.
>
> (2) While a designation in favour of a spouse, child, grandchild or parent of a person whose life is insured, or any of them, is in effect, the insurance money and the rights and interests of the insured therein and in the contract are exempt from execution or seizure.

A similar provision is made for accident insurance in s. 374.

As for pension funds and pension income see: *Employment Pension Plans Act*, s. 59; *Local Authorities Pension Plan Act*, s. 42; *Members of the Legislative Assembly Pension Plan Act*, s. 36; *Public Service Management Pension Plan Act*, s. 42; *Public Service Pension Plan Act*, s. 42; *Special Forces Pension Plan Act*, s. 42; and *Universities Academic Pension Plan Act*, s. 41.

Further, it might seem irrational and arbitrary that some debtors are protected completely because the capital out of which their future pension incomes will be paid is not their property and cannot be enforced against, whereas some other debtors, for example, the holders of RRSPs, have no such protection because they do beneficially own the capital. The law should promote consistency of treatment in this area.

On the other side, it might be argued that a debtor should be required to use present resources to pay present debts. If the debtor wishes to secure future income, he or she should do so only after the present slate has been cleaned. The social policy of encouraging planning and saving for the future does not suggest that this should be done at the expense of one's present creditors. Society encourages such frugality and economy as is necessary to produce a fund *not required for present purposes* that can be invested for the future. The frugality and economy should be that of the individual whose future is thereby secured, not that of his or her creditors. The inconsistency of treatment between debtors who own the capital of their retirement security and those who do not should not be resolved at the expense of the creditors of the former.

We do not wish to make any recommendation on this subject. We think that the arguments are strong both ways and that the issue has too many social and political overtones for us to attempt to resolve it. The proper solution might be that no exemption is appropriate in this area, it might be that all future income security arrangements should be exempt, or the solution might be that some minimum standard of future income security should be exempt and that the capital of any such fund beyond the standard should be exigible.

A similar debate arises over the existing exemption for insurance contracts. We observed in our 1978 Working Paper that, so far as the exception operates to protect the dependants of the insured debtor from the loss of the proceeds of the policy after the debtor has died, the exemption is unobjectionable. To the extent that the provision protects money that the debtor pays into an insurance contract from which he or she can withdraw or borrow against, however, it goes beyond its justification. In 1978, for consultative purposes, we recommended that either:[493]

(1) the insurance exemption should be abolished; or

(2) the exemption should be limited to provide reasonable protection for those who are dependent on the insured. Reasonable should be interpreted as relief from hardship interpreted objectively.

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[493] Exemptions, *supra*, note 464 at 37.

The Canadian Life Insurance Association responded to our working recommendation. Among the several points they made were these:

(1) If it were not for the protection of this provision, creditors would be able to terminate life insurance policies held by their debtors. Depending on the change in the debtor's health and age and changes in the insurance market since the time the collapsed policy was obtained, the debtor might be unable to replace the coverage at all or at a reasonable cost.

(2) The cash surrender value to which the creditors might gain access would in most cases be of far less benefit to them than the insurance proceeds would be to the beneficiaries of the debtor when he dies.

(3) The vast majority of insurance policies are not bought for their investment value — they are bought for their beneficiary protection value.

(4) Where a policy is bought to avoid creditors, the purchase can be attacked as a fraudulent conveyance.

These points are of considerable weight. They do not, however, seem to answer the objection that in some cases a debtor with the appropriate kind of insurance policy is able to divert money that should go to the satisfaction of debts.

We do not wish to recommend any changes in this context either. We recommend simply that the policy involved be reviewed by the government.

RECOMMENDATION 116:

EXEMPTION OF FUTURE SECURITY PLANS

The government should establish a policy for the exemption from enforcement of future income security plans and should review the present policy for the exemption of insurance contracts from enforcement.

G. Comparison of Existing and Proposed Exemptions

It might be useful for us to present a comparison of the exemptions that apply at present under the *Exemptions Act* and Alberta Rules of Court (for wage garnishment) to the exemptions that we have proposed. The comparison is presented in the following table.

COMPARISON OF EXISTING AND PROPOSED EXEMPTIONS

ASSET CATEGORY	*EXISTING EXEMPTIONS*	*PROPOSED EXEMPTIONS*
Basic Necessities		
Food	— 12 months supply for debtor and family	— same
Clothing	— necessary and ordinary clothing of debtor and family	— same
Shelter		
Rural farmer	— home on 160 acres regardless of value	— home on 160 acres regardless of value, but only if farming the land, which includes the land on which the home is located, and if it is a chief source of livelihood.
Urban and rural non-farmer	— home if equity less than $40,000; $40,000 if equity greater	— home if equity less than $40,000; $40,000 if equity greater; portion of exemption if home co-owned. No recommendation as to whether $40,000 should stay at that level or be increased.
Mobile home	— mobile home if equity less than $20,000; $20,000 if equity greater	— mobile home if equity less than $20,000; $20,000 if equity greater; portion of exemption if mobile home co-owned.
Furniture	— furniture, etc., to a value of $4000	— same
Motor vehicle	— no exemption in this context	— one motor vehicle to a value of $3000, or $3000 if only vehicle is worth more and is sold.
Medical and dental equipment	— no exemption	— all medical and dental aids and equipment for debtor and family; no monetary limit.
Personal sentimental memorabilia	— no exemption	— debtor's choice to $500 monetary limit.

ASSET CATEGORY	*EXISTING EXEMPTIONS*	*PROPOSED EXEMPTIONS*
Livelihood Exemptions		
General:		
Tractor	— one tractor required in trade and calling	— no specific exemption — claimable under "tools and equipment".
Automobile	— one, if worth less than $8000 and required for trade or calling	— no exemption in this category (see basic necessities) — claimable under "tools and equipment".
Truck	— motor truck required in trade or calling (alternative to automobile)	— no exemption — claimable under "tools and equipment".
Books	— books of a professional person if required in that person's profession	— no specific exemption — claimable under "tools and equipment".
Tools and equipment	— tools and equipment used in trade or profession; monetary limit of $7500	— personal property used in occupation; monetary limit of $10,000; $10,000 if claimed equipment is worth more than $10,000 and is sold.
Farm Exemptions:		
Land	— 160 acres actually occupied by debtor	— 160 acres actually occupied by the debtor if debtor's chief source of livelihood is from farming.
Current debt obligations	— sufficient farm produce to cash to pay: a) debts for current crop and livestock operation of last six months b) current and one year's arrears of taxes, or one year's consolidated taxes c) cash outlays for next 12 months farming operations	— same
Farm animals and equipment	— animals and equipment necessary for next 12 months farming operation	— same
Tractor	— one tractor required for farm operation	— no specific exemption — included in farm equipment exemption.
Motor vehicle or truck	— one automobile ($8000 monetary limit) or one motor truck if required for agricultural purposes	— no specific exemption — included in farm equipment exemption.
Seed grain	— seed grain sufficient to seed debtor's land under cultivation	— same

ASSET CATEGORY	*EXISTING EXEMPTIONS*	*PROPOSED EXEMPTIONS*
ncome Exemption		
Exemption	As per Rule 483(1) — — $700 married debtor — $ 80 for each dependant — $515 for single-parent — $140 for each dependant — $525 for single debtor	— a percentage of net income subject to a maximum and minimum. — net income defined as gross income less deductions for income tax withheld, Canada Pension Plan contribution, unemployment and workers' compensation premiums. — no specific recommendation except that percentage should be between 70% and 85%. — minimum and maximum exemption

Dependants	Minimum	Maximum
0	800	2400
1	1330	2930
2	1596	3196
3	1862	3462
4	2128	3728
5	2394	3994

H. Exceptions to Exemptions

The enforcement exemptions structure also establishes several exceptions — situations where the exemptions do not apply in whole or in part. Several of these exemptions exist because of some characteristic of the debtor; others because of some characteristic of the creditor.

(1) Exceptions for Classes of Debtors

(a) Absconding debtor

Section 1(2)(a) of the *Exemptions Act* provides that the exemptions created by section 1 are not available:

> (a) when the execution debtor has absconded or is about to abscond from Alberta, leaving no wife or husband or minor children within Alberta . . . .

Rule 483(5)(b) provides that the wage exemptions do not apply in the same circumstances.

We think that this exception is unwarranted. If it is intended to deter debtors from absconding, we doubt that it has any influence. Furthermore, such an exception smacks of outlawry when it provides that a person who has renounced obligations within the province should lose the protection of its laws. Exemptions represent necessary property, and the necessity remains even if the debtor has behaved badly. The exemption should be lost only if the debtor has demonstrated by abandoning property that he or she has no need for it. In our Report on Prejudgment Remedies for Unsecured Claimants, we recommended that a prejudgment remedy should not be available in respect of exempt property.[494] This exception is inconsistent with that recommendation.

RECOMMENDATION 117:

ABSCONDING DEBTOR

The denial of exemptions to debtors who have absconded or who are about to abscond should be abolished; however, exemptions should not apply to property that the debtor has abandoned.

(b) Debts arising from criminal activity

Section 1(2)(b) provides that exemptions do not apply to:

> . . . execution issued on a judgment or order . . .
>
> (iii) for restitution made under the *Criminal Code* (Canada), or
>
> (iv) for damages and costs, if any, arising out of an act in respect of which the execution debtor was convicted of an offence under the *Criminal Code* (Canada).

The intention of the first of these exceptions is puzzling. The Criminal Code contemplates a restitution order, in section 491.1, under which the court can order the return of property obtained by an accused person through the commission of an offence to its lawful owner. There is no question of exemptions in this context. The context is not one of seizure under a writ of execution. It is simply the return of property to its lawful owner.

It must be that the reference in subsection (iii) is to the enforcement of a compensation order, granted pursuant to section 725 or section 726 of the Criminal Code, the civil collection of a fine under section 724, or the collection of costs under section 728, and that subsection (iv) relates to a judgment obtained in exclusively civil proceedings for the damages suffered as a result of criminal activity.

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[494] Prejudgment Remedies, *supra*, note 5, Recommendation 8 at 184.

The provision gives priority to the policy of compensating victims of crime rather than the policy of exemptions. We do not question the appropriateness of that policy choice; however, we do suggest that the language of the provision be improved so that it is clear that it does not intend to refer to a restitution order.

If otherwise exempt property is sold under this exception, and if the proceeds are greater than those required to satisfy the debt, the surplus should be returned to the debtor. It should not be distributed to other enforcement creditors.

RECOMMENDATION 118:

DEBTS ARISING FROM CRIMINAL ACTIVITY

Exemptions should continue not to apply to enforcement of debts arising from criminal activity; however, the language of the provision establishing the exemption should be improved so that it is clear that it does not intend to refer to a restitution order under the Criminal Code.

If otherwise exempt property is sold under this exception, and if the proceeds are greater than those required to satisfy the debt, the surplus should be returned to the debtor. It should not be distributed to other enforcement creditors.

(c) Corporations and partnerships

The *Exemptions Act* is silent on whether or not the exemptions it creates can be claimed by a corporation. It appears that exemptions are claimable by corporations in some provinces but are not claimable in other provinces.[495] In Alberta, the point has been settled by the courts.

Haddad, D.C.J (as he then was) said in *Western Foundations Borings v. Walters Construction Ltd.*:

> It is quite evident from an examination of the whole Act and the nature of the exemptions granted

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[495] Dunlop, *supra*, note 1 at 339.

> thereunder that the words "execution debtor" as used therein refer to the individual and that all the provisions of the statute are designed to apply to benefit an individual and his family.
>
> . . . I am convinced, therefore, that it was never intended by the legislature that *The Exemptions Act* should apply to a limited company or corporation of any kind . . . .[496]

There is also an Alberta authority that exemptions cannot be claimed by partnerships in respect of execution against the partnership assets.[497] We think that this interpretation of the law is sound and that it should be provided expressly in the reformed legislation that the exemptions cannot be claimed by corporations or by partnerships.

We do not think that an incorporated family farm or other small business should be treated any differently. Incorporation affords the benefit of limited liability to the company's principals. We do not think that they should also have the benefit of exemptions.

RECOMMENDATION 119:

CORPORATIONS

The reformed legislation should provide expressly that exemptions do not apply to corporations or partnerships.

(2) Exceptions for Classes of Creditors

(a) Alimony creditor

Both the *Exemptions Act* and the Rules of Court provide that the exemptions that they create do not apply to the enforcement of a judgment or order for the payment of alimony or the maintenance of the debtor's spouse, former spouse or children.[498]

This exception is justified, since the creditors benefited by the exception are the people intended to be benefited by the exemption. Debtors' basic necessities and wages are exempt so that they can sustain themselves and their families. The exemptions themselves should not prevent the debtor's dependants from being sustained.

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[496] (1966) 57 W.W.R. 178 (Alta. D.C.) at 182.

[497] *MacKinnon v. Beals* [1917] 1 W.W.R. 1328.

[498] *Exemptions Act*, s. 1(2)(b)(i), (ii); Rule 483(5)(c).

It might be argued that the justification for this exception does not support the total denial of basic necessity exemptions to the alimony or maintenance debtor. Arguably, some portion of the exemption should be maintained. Furthermore, the justification for the exception might be considered weak in the context of the livelihood exemptions. The Ontario Law Reform Commission recommended that the alimony debtor be entitled to one half of the basic necessity exemption and all of the livelihood exemption.[499]

We are not inclined to recommend, however, that the exception be altered in this regard. This exception is but one part of the legal mechanism by which the enforcement of maintenance and alimony debts is given special treatment. The ability of the debtor to pay and his or her own requirements are considered by the court when the order is made. The debt is afforded preferred status. There is special legislation and a special government office assigned to the collection of these debts. We think that it would be inappropriate to recommend the reform of one of the elements of this structure without considering it in the context of the entire structure. Such an analysis is beyond the scope of this project. Accordingly, but with two exceptions, we would recommend that the *status quo* be maintained.

The first exception arises because the regulations under the *Maintenance Enforcement Act* provide for the exemption of a portion of the debtor's wages when they are subjected to the continuing attachment procedure established under that act.[500] There is, therefore, a conflict between the *Maintenance Enforcement Act* and the present exemption legislation. We think that the debtor should be in the same position, regardless of which procedures are used, and we would alter the exception accordingly to make it consistent with the Maintenance Enforcement Regulations.

The other exception relates to a point on which the present provision is silent. If the proceeds of enforcement against property, which would be exempt if it were not for this exception, exceed the amount of the alimony or maintenance debt, the excess should be returned to the debtor. It should not be available for distribution to other enforcement creditors who are not entitled to the benefit of the exception.

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[499] OLRC Part 2, *supra*, note 57 at 94.

[500] *Maintenance Enforcement Act*. Alberta Regulation 2/86, s. 13.

RECOMMENDATION 120:

ALIMONY AND MAINTENANCE CREDITORS

Generally, exemptions should not apply to the enforcement of alimony or maintenance judgments and orders; however, a debtor should be entitled to the exemption for wages granted by the regulations under the *Maintenance Enforcement Act*, regardless of whether the alimony or maintenance creditor proceeds under that act or under the general enforcement procedures.

If otherwise exempt property is sold pursuant to this exception, and if there is a surplus of proceeds after the debt is satisfied, the surplus should be returned to the debtor. It should not be distributed to other enforcement creditors.

(b) Room and board creditor

Rule 483(5)(a) provides that wage exemptions do not apply:

> (a) where the debt sued for, or in respect of which judgment was recovered, was contracted for board and lodging or either of them . . . .

This kind of exemption is present in some provincial exemptions legislation and absent in others. The Ontario Commission recommended against its inclusion in the Ontario legislation.[501]

Exemptions provisions are paternalistic to a certain extent, but they proceed, at least the wages exemption, they proceed on the assumption that the debtor will use exempt wages to purchase current basic necessities. This exception seems to attempt to go further than that and to ensure that one possible class of provider of basic necessities — the landlord — gets paid from the exempt wages. We think that this additional paternalism is unwarranted, and therefore we would abolish the exception.

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[501] OLRC Part 3, *supra*, note 212 at 175.

RECOMMENDATION 121:

ROOM AND BOARD CREDITOR

The exception to wage exemptions for debts contracted for board and lodging should be abolished.

(c) Creditor for price of exempt property

Section 4 of the *Exemptions Act* provides:

> 4 Nothing in this Act exempts from seizure an article the price of which forms the subject matter of the judgment on which the execution is issued, except articles intended for food, clothing and bedding of the execution debtor and his family.

The Ontario Commission considered this kind of exception. It said:[502]

> It seems discriminatory that the debtor's kitchen table may not be seized by a creditor who sold him food, but may be seized . . . by the creditor who sold him the table. The result has a rather fortuitous and arbitrary, although perhaps superficially compelling, flavour to it. Today, when mass manufacturing and mass distribution to credit-oriented consumers are the norm, many merchants expend little time gauging the full implications of any financial default on the part of the buyers. It is not very likely that the creditor, in selling the debtor a table, envisages that he ultimately will have special and exclusive recourse to that table should the debtor fail to pay the price. If he thought about this matter at all, he might require a security agreement in respect of the chattel; more than likely he would expect to have access to the debtor's whole asset pool, save and except those assets generally exempt from seizure. Where, however, the debtor has not paid any of his creditors, on balance we do not see any justification for granting special privileges to certain creditors along the lines [of this exception]. Moreover, if the basic rationale for exemption legislation is to provide the debtor with the necessities of life, both domestic and occupational, the special protection for certain creditors afforded [by the

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[502] *Ibid*. at 90.

> exception] does not seem warranted or desirable. Accordingly, we recommend its repeal.

We agree with this reasoning and the conclusion based on it and make the same recommendation.

RECOMMENDATION 122:

CREDITOR FOR PRICE OF EXEMPT PROPERTY

The exemptions provisions should apply to the enforcement of a judgment for the price of the exempt property. The present exception should be abolished.

(d) Hospital creditors

Section 8 of the *Exemptions Act* creates an exception to the exemption of agricultural products that are intended to protect the ability of the farm debtor to pay current operational expenses.[503] The exemption does not apply to the enforcement of a debt in respect of hospital services.

The provision was introduced in 1942 before the introduction of universal health insurance coverage. Whatever limited assistance it gave to hospital creditors is no longer needed. The provision is obsolete and should be abolished.

RECOMMENDATION 123:

HOSPITAL CREDITORS

The limited exception created by section 8 of the *Exemptions Act* for hospital creditors should be abolished.

(e) Crown creditors

The present exemptions legislation does not say that it binds the Crown as a creditor. It could be that, notwithstanding this silence, where the Crown chooses to use the enforcement system to collect debts owed to it, it is bound by all the rules of that system, including exemptions.[504] Whether or not that is how the law stands at present, we think that it should. The debtor is in no less need of basic necessities, the property required to earn a livelihood and wages when the creditor is the Crown. Generally, the state assumes an obligation to maintain its citizens to at least a minimum level. Therefore, when collecting debts, it should not deprive citizens of their basic needs.

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[503] *Exemptions Act*, s.1(1)(c)(ii), (iii), (iv).

RECOMMENDATION 124:

CROWN CREDITORS

The reformed exemptions legislation should provide expressly that the Crown is bound by it.

I. Operational Issues

(1) Compensating for the Effects of Inflation

Early in this chapter, we discussed the problem of obsolescence of specific exemptions resulting from inflation. We concluded that the present approach of leaving it to the Alberta Legislature to amend the legislation to update the monetary limits to account for inflation has been unsuccessful historically and should be modified. We suggested that the monetary limits should be adjusted periodically to respond to inflation.

The monetary limits that we suggest should be subjected to periodic adjustment to respond to inflation are:

a. the urban house exemption — $40,000;
b. the mobile home exemption — $20,000;
c. the furniture and appliances exemption — $4,000;
d. the motor vehicle exemption — $8,000;
e. the personal memorabilia exemption — $500;
f. the tools of the trade exemption — $7,500;
g. the minimum and maximum wage exemption — various amounts

How should this periodic adjustment process be designed? One alternative would be to provide an "automatic escalator", which would apply some automatically determined multiplier to the monetary limits at regular intervals.

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[504] *Alberta Mortgage and Housing Co.* v. *Ciereszko, Craik and Craik* (1987) 50 Alta. L.R. (2d) 289 (C.A.); *Royal Bank* v. *Black and White Developments Ltd.* (1988) 60 Alta. L.R. (2d) 31 (C.A.); *Director of Soldier Settlement* v. *Snider Estate* [1988] 6 W.W.R. 360 (C.A.); *Farm Credit Co.* v. *Holowach (Trustee of)* (1988) 59 Alta. L.R. (2d) 279 (C.A.); *Labour Relations Board* v. *Alberta Manpower et al.* (1988) 60 Alta. L.R. (2d) 261 (C.A.).

An example of this kind of provision is found in the *Canada Pension Plan Act*,[505] which calls for the establishment each year of a pension index calculated using the Consumer Price Index published regularly by Statistics Canada under the authority of the *Statistics Act*.[506] The *Canada Pension Plan Act* requires that benefits payable under the act be adjusted annually using the change in the Pension Index since the last adjustment.

We are not inclined to recommend an automatic formula of this kind. Indices such as the Consumer Price Index might be the best indicators of inflation that exist, but they are no more than an indicator — they are not a precise measure of inflation. It is possible, we realize, to obtain a Consumer Price Index figure for Alberta and for various kinds of commodities, but no one figure is entirely appropriate for use in adjusting the monetary limits appropriate for such diverse property as houses, mobile homes, furniture, appliances, automobiles, trade tools, etc. We think that the Consumer Price Index should be considered an extremely useful indicator; but, as an indicator, it is most useful when there is someone to read it, interpret it, and follow its direction if it suggests movement.

We prefer an adjustment mechanism of the kind that has been used in the *Judgment Interest Act*.[507] Section 4(2) of that statute provides that interest is to be awarded on pecuniary damages at a rate to be prescribed by regulation. The mechanism for establishing the applicable rate for each year is described as follows:

> (3) Before the beginning of each year, the Lieutenant Governor in Council may, by regulation, prescribe the rate to be applied under subsection (2) for that year.
>
> (4) If a rate is not prescribed in accordance with subsection (3) the rate in effect in the previous year continues to apply until the beginning of a year for which a rate is prescribed.

The statute came into force in 1984. Regulations have been passed each year to establish the interest rate for the next year.[508] The rate has changed three times and twice it has been kept the same as the rate for the previous year.[509]

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[505] R.S.C. 1985, c. C-5, ss 43, 45(2).

[506] R.S.C. 1985, c. S-19. Section 22 requires statistics regarding prices and the cost of living to be collected, compiled, analyzed, abstracted and published.

[507] R.S.A. 1985, c. J-0.5.

[508] Alberta Regulations 364/84, 391/84, 372/85, 373/86, 476/87, 343/88.

[509] The rate began at 11% for 1984, was moved to 10% for 1985, to 8% for 1986, 1987 and 1988, and then increased to 9% for 1989.

Clearly, the mechanism used in the *Judgment Interest Act* is a vast improvement on a statutorily established rate that might become obsolete before it receives legislative attention. It has permitted adjustments when changes in the state of the economy rendered them appropriate. It has allowed the rate to remain the same when changes in the state of the economy were insufficiently significant to require change.

We recommend that this model be used for the adjustment of the exemption monetary limits. The base limit should continue to be specified in the statute, but the limits specified should be subject to an adjustment that is to be proclaimed by regulation at regular intervals. In the exemptions context, it would be desirable, we think, to require that the monetary limits be reviewed at least every three years, and that they be adjusted if on such review they are found to have been eroded by inflation to a degree that adjustment is considered necessary. We think that the discretion of whether an adjustment is required is assigned appropriately to the lieutenant governor in council.

It might be bothersome that interested parties would have to refer to regulations to determine the current level of exemptions. We think that this is the price of avoiding injustice through obsolescence, and that maintaining exemption levels that are sufficient under current conditions is worth it. In any event, for the people most affected, debtors, creditors and garnishees, the statute is as remote a source of information as are the regulations. A far more important source of information to these parties, in particular the debtor and the garnishee, is the literature regarding exemptions that the sheriff delivers at the time of seizure or that is served with the garnishee summons. If this literature is kept up-to-date with the current monetary limits, it matters little whether the primary source of the information is the statute or the regulations under it. As far as other interested parties — lawyers and sheriff's officers — are concerned, it is not too great a burden to require them to inform themselves by reference both to a statute and regulations.

RECOMMENDATION 125:

ADJUSTMENT FOR INFLATION

The lieutenant governor in council should examine the monetary limits for specific exemptions and the minimum wage exemption at least every three years, and the limit or minimum should be adjusted accordingly if it is considered that any of them have been eroded by inflation.

(2) Exemptions: Automatic or Granted if Claimed?

Before 1976, different approaches to exemptions were followed in the two divisions of the District Court. In the Northern District, exemptions were treated as a right that automatically enured to the benefit of debtors, whether or not they asserted the right. In the Southern District, exemptions were looked upon as something to be recognized if the debtor took steps to claim the exemption. After the two divisions were merged, the amalgamated court adopted a single approach. In *Carmar Holdings Ltd. v. Harpe,*[510] Stevenson D.C.J. (as he then was) held that the exemption need not be claimed. He said:

> I would have been inclined to follow the reasoning . . . to the effect that exemption need not be claimed, as a matter of interpretation, and I respectfully consider the matter to be put beyond doubt by section 45 of the *Seizures Act,* which is inconsistent with the proposition that the debtor must raise the exemption. There is an obligation on the sheriff [not to seize exempt property], whether or not the debtor raises the objection, and on an application of the kind before me I cannot dispose of it simply by saying that since the debtor has not raised the question of an exemption, the goods are not or cannot be exempt.[511]

Stevenson D.C.J. went on to describe the procedure to be followed where property that could conceivably be exempt has been seized and a notice of objection to seizure has been filed. He ruled that the creditor has an obligation to give the debtor notice that the issue of exemptions will be dealt with at the application for removal and sale. In the practice that has grown out of the *Carmar* decision, this is usually accomplished by the creditor asking in the notice of motion for an order declaring the property not to be exempt.

At the application for removal and sale, that the property has been seized, given the obligation on the sheriff not to seize exempt property, is taken as establishing a *prima facie* case that the property is not exempt. The evidential burden of establishing otherwise then shifts to the debtor. If the debtor does not attend the application, then the issue is resolved against him or her by default. If the debtor does attend and offers evidence that the property is exempt, the court must make a determination.

We think that the ruling of Stevenson D.C.J. in *Carmar* is not only what the law is but also what the law should be. The reformed statute should expressly say so, and the *Carmar* procedure should be incorporated into the reformed legislation.

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[510] *Supra,* note 110.

[511] *Ibid.* at 79.

We think also that one exception is necessary. Where the subject of enforcement is land, we think that it is reasonable that the onus be on the debtor to claim the exemption and to establish that the land being enforced against is within the description of the exemption. The *Carmar* procedure cannot be applied, because there is no "seizure" to give rise to the presumption of exigibility and no automatic application where the issue can be addressed. We discussed the occasions when the debtor might apply for an order determining the exempt status in Chapter 6.

RECOMMENDATION 126:

EXEMPTIONS EXIST AS OF RIGHT

The reformed legislation should provide expressly that exemptions, with one exception, are applicable automatically. The procedure mandated by Stevenson D.C.J. in *Carmar Holdings v. Harpe* should be incorporated into the reformed legislation. The exception should be the shelter exemption. Land against which enforcement proceedings are taken should be presumed not to be exempt unless the debtor claims the exemption.

(3) Waiver of Exemptions

Should the debtor be able to waive an exemption, and allow otherwise exempt property to be seized?

We think not. The discussion of the policy of exemptions at the beginning of this chapter indicated our view that exemptions exist for the good of the debtor, creditors and society. The debtor and creditors should not be able to prejudice society's interest by waiving them. Exemptions establish a limit beyond which no debtor should be permitted to fall *or jump*. Therefore, any purported waiver of exemptions by an enforcement debtor (or someone who might become an enforcement debtor in the future) should be ineffective. We do not suggest, however, that a person should be prevented from disposing of or dealing with property that would be exempt from enforcement proceedings.

RECOMMENDATION 127:

WAIVER OF EXEMPTIONS

Exemptions should not be waivable by the debtor.

(4) Relevant Time

What should be the relevant time for characterizing property for the purposes of exemptions?

In *Amalgamated Credit Union v. Letwin,*[512] the sheriff seized a truck that, at the time of seizure, was required by the debtor in his trade and calling. By the time of the application for removal and sale, the debtor had abandoned his former trade and calling, thus it could not be said that the truck was required for it. The seizure was held invalid. The relevant time for characterizing the property was held to be the time of seizure. The *Exemptions Act* exempts property from "seizure under a writ of enforcement". Obviously, the seizure was invalid.

In an annotation to *Letwin,* [513] Professor Dunlop suggests that if the facts had been reversed and a truck — not exempt at the time of seizure — had had the characteristic necessary to qualify it for exemption at the time of the application, by a strict application of the present law it could not be considered exempt. He suggested also that an equitable judge would probably exercise his or her discretion under section 29(5)(d) of the *Seizures Act* to adjourn the sale on generous terms so that the strict application of the law would not result in injustice.

We suggest that the sensible approach is that the relevant time for characterizing the property should be when the question is being asked. If the property was exempt at the time of seizure, but not at the time of the application to deal with the debtor's objection to seizure, the purposes of the exemptions provisions will not be served by holding it to be exempt. Exemptions should not be considered to be exemptions from seizure; they should be considered exemptions from enforcement. Property should not be seized if it is exempt at the time of seizure, and it should not be ordered sold if it is exempt at the time of the application for sale.

RECOMMENDATION 128:

RELEVANT TIME

The determination of whether or not property is exempt should be based on the facts at that stage of the enforcement process when the issue of exemptions is relevant. Property exempt at the time of seizure, but no longer exempt at the time of the application for the sale

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[512] (1983) 23 Alta. L.R. (2d) 30 (M.C.Q.B.).

[513] C.R.B. Dunlop, *Annotation to Amalgamated Credit Union v. Letwin, ibid.* at 31.

order, should not be considered exempt, and *vice versa*. The exemptions should be considered exemptions from enforcement, and not from seizure.

(5) Extended Exemption

In the context of the shelter exemption, the motor vehicle exemption and the "tools of the trade exemption", we recommended that, where the value of the debtor's property is beyond the monetary limit and the property is sold, that portion of the net proceeds up to the level of the monetary limit should be paid to the debtor. We recommended that, in the case of the house exemption, the funds paid to the debtor should be exempt for six months, as long as they could be identified with the exempt source.[514] In the case of the motor vehicle and the tools exemptions, we recommended that the funds be exempt on the same basis, but for the shorter period of 60 days.[515]

A comparable situation arises when the debtor voluntarily sells exempt property, with the intention of replacing it; or when exempt property is stolen or destroyed and the debtor receives cash from the insurer; or when, as is now common, the debtor's wages are paid directly into his or her bank account; or even when the debtor deposits a pay cheque into his or her account. It has been held that the proceeds of a voluntarily sale of exempt property are not exempt.[516]

We think that, in the case of the exempt portion of enforcement sale proceeds and in the case of a voluntary sale of exempt property, the cash into which the exempt property has been converted should be exempt for a period long enough to permit the debtor to convert the cash back into exempt property. We think, however, that it should be a condition of this "extended" exemption that the fund for which the exemption is claimed is not mixed with any other fund. The creditor should not be delayed and the court's time should not be wasted by applications to determine which part of a mixed fund is the remaining proceeds of a sale of exempt property, especially when it would have been simple for the debtor to have kept the fund separate when it was created. If the proceeds are mixed with another fund, the exemption should be lost.

We have considered whether or not a similar provision should be made for the exempt portion of a debtor's monthly wages. It was held in a Manitoba case that, although wages deposited directly into a bank account by the debtor's employer are still wages and subject to the exemption until they are removed from the account, they would not have been exempt in a bank account if they had been paid to and deposited by the debtor, or if they had been removed from the original account and deposited into another.[517] This creates a curious anomaly.

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[514] See Recommendation 102, *supra*, at 274.

[515] See Recommendation 104, *supra*, at 277 and Recommendation 108, *supra*, at 284.

[516] *Regal Distributors Ltd. v. Freele* [1931] 1 W.W.R. 299; *Re Burns et al. and Lock* (1977) 4 Alta. L.R. (2d) 258.

Unfortunately, we do not think that it is practical to resolve this anomaly by providing that wages paid into a bank account by a debtor maintain their exempt status. We think that the consequence of doing so would be to encourage frustration in the garnishment of bank accounts, for debtors would be forever objecting to the garnishment of bank accounts because the funds in the account included exempt wages.

The "extended" exemption is tolerable in the case of the exempt portion of the proceeds of the sale of exempt property or any sale of exempt property because the situation is not likely to arise frequently, and it will be practical for the debtor to maintain the exempt fund separate from all other funds and easy to establish the source of the fund. If the extended exemption idea was applied in the case of exempt wages, however, claims that a garnisheed bank account was made up of exempt wages would be common and the need for judicial intervention would arise regularly. We do not think that it would be practical to require the debtor to keep wages separate from all other funds because that would require the opening of a new bank account each month.

RECOMMENDATION 129:

EXTENDED EXEMPTION

Where the debtor is paid the exempt portion of the proceeds of an enforcement sale, or where exempt property is voluntarily sold by the debtor, the fund should be exempt for 60 days following the conversion, provided that the debtor keeps the fund separate from all other funds. This extended exemption should be lost if the fund is mixed with other funds. In the case of the sale of the debtor's house, the period of the extended exemption should be six months.

(6) Survival of Exemptions

Section 5 of the *Exemptions Act* provides that exemptions survive the debtor and continue as long as the exempt property is in the use of the surviving spouse or minor children of the debtor and is necessary for their maintenance and support.

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[517] *Holy Spirit Parish Credit Union v. Kwiatkowski* (1969) 68 W.W.R. 684 (Man. Q.B.).

Section 6 contemplates the selection of exempt property in a class being made by the surviving spouse or family of a deceased execution debtor.

We think that both provisions should be continued in the reformed legislation; however, the reformed provision should be drafted to avoid the result in *Re Ferguson*,[518] where none of the creditors of the debtor had obtained judgments at the time of his death. It was held that the debtor was never "an execution debtor". None of his property was exempt from seizure because none of it was subject to seizure; thus his widow could not have the benefit of section 5.

Egbert J. was unable to interpret this unfortunate result away. He said:

> This, of course, creates a completely absurd situation. From the debtor's standpoint he is in a better position if his creditor drags him into court and obtains judgment against him than if the creditor shows leniency and consideration and refrains from taking action; from the creditor's standpoint he is in a worse position if he goes to the expense of obtaining judgment against his debtor than if he merely stood passively by and did nothing. But the absurdity is created by the statute itself, and is one which must be corrected by the legislature and not by the courts.

We recommend that the Legislature take up this 32-year-old invitation. The absurdity could easily be removed by removing the adjective "execution" from before the noun "debtor".

RECOMMENDATION 130:

SURVIVAL OF EXEMPTIONS

Exemptions from enforcement should continue to apply after the death of the debtor as provided for at present. The debtor's spouse and minor children should be able to claim the deceased debtor's exemptions also where the judgment being enforced was obtained against the estate after the debtor's death.

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[518] (1957) 23 W.W.R. 521 (Alta. T.D.).

(7) Selection within the Class

The present *Exemptions Act* section 6 provides that, where the debtor owns more of an exempt class of property than is exempt (ie, his furniture exceeds $4000 or there is more than a year's supply of food), the debtor may select that portion of the class of property that shall be exempt.

The Ontario commission proposed an improvement to the equivalent Ontario provision that we wish to adopt. First, they recommended that the debtor should be required by the sheriff to select at the time of seizure. If the debtor fails or refuses to do so, the sheriff's officer should make the selection.[519]

RECOMMENDATION 131:

SELECTION WITHIN THE CLASS

The debtor should continue to have the right to select the particular items in an exempt class of property that shall be exempt. The debtor should be required to make the selection at the time of seizure. If the debtor fails to do so, the selection should be made by the sheriff's officer conducting the seizure.

(8) Instruction to Sheriff

Section 7 requires the sheriff not to seize property that appears to be exempt. It also protects him from liability if in good faith he seizes property that is exempt.

Section 45 of the *Seizures Act* permits the seizure of exempt property where the sheriff "considers it impracticable to except from the goods and chattels seized those goods and chattels that are exempt from seizure". The sheriff is further authorized to hold the seized goods until "he can conveniently ascertain the goods and chattels exempt from seizure", at which time he is to release the exempt goods to the debtor.

We would continue both provisions. In the reformed legislation, they should appear in greater proximity than they do now. We propose no alteration to the procedures that the sheriff uses at present to resolve doubts about the status of any property.

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[519] OLRC Part 2, *supra*, note 57 at 100.

RECOMMENDATION 132:

INSTRUCTION TO SHERIFF

The sheriff should be instructed by the reformed legislation not to seize property that appears to be exempt. The instruction should be subject to the same qualifications as appear now in section 7 of the *Exemptions Act* and in section 45 of the *Seizures Act*.

(9) Dispute Resolution

Questions and disputes over whether or not particular property is exempt can be brought before the court in several ways.

The most frequently used method is for the debtor to file an objection to seizure on the ground that the property is exempt. The issue will then be determined upon the creditor's application for an order permitting sale of the seized property.

The second method is provided by section 7(2) of the *Exemptions Act*:

> A creditor, on notice of motion to the debtor, may apply to the Court of Queen's Bench for an order declaring any specific goods of the debtor to be not exempt from seizure under this Act.

As a result of *Carmar Holdings Ltd*. v. *Harpe*,[520] the usual practice is for the creditor to combine an application for such an order with the application for an order permitting sale. This provision should be continued.

Another method is provided by section 9 and requires the sheriff to refer any dispute over the claim of an exemption to the court. This provision should be continued.

An additional method, under our proposals, would be for any interested party to bring application for a determination of the issue pursuant to the general application procedure recommended elsewhere in this report.[521]

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[520] *Supra,* note 110.

[521] See Recommendation 5, *supra,* at 28.

RECOMMENDATION 133:

DISPUTE RESOLUTION

The creditor should continue to have a right to apply for an order declaring any specified property of the debtor to be not exempt from enforcement.

The requirement that the sheriff refer any dispute over the claim of an exemption to the court should be continued.

(10) Distress Exemptions

Section 2 of the *Exemptions Act* sets out the exemptions from seizure pursuant to a distress by a landlord for rent. Consideration of the exemptions that are appropriate in that context is beyond the scope of this reform project. Accordingly, we make no recommendation with regard to section 2, except that it be preserved in another statute if, as we recommend, the *Exemptions Act* is repealed by the enactment of the statute incorporating the recommendations of this report. The *Landlord and Tenant Act* seems to us to be the proper statute to receive the provision.

RECOMMENDATION 134:

EXEMPTIONS FROM DISTRESS SEIZURE

The present section 2 of the *Exemptions Act,* which deals with an unrelated matter, exemption from distress seizure by a landlord for rent, should be moved to another appropriate statute, probably the *Landlord and Tenant Act.*

EMPLOYER'S EXEMPTION RETURN

(See page 298)

Name of Employee: ______________________

Number of Dependants from TD1 form: ______

Step 1: Calculation of Net Pay:

Gross Wages Due: A ____________

Deductions:

Income Tax B ____________
Employee CPP C ____________
Employee UIC D ____________
Employee WCB E ____________
Compensation F ____________

Total Deductions
(Add B,C,D,E,& F) G ____________

Net Pay (A minus G) H ____________

Step 2: Calculation of Exemption

2.1

Net Pay (Line H) I ____________
Minimum Exemption
(from Table) J ____________

Difference (I minus J)
(enter nil if J exceeds I) K ____________

If amount K is greater than 0, proceed to Step 2.2.
If amount K is nil, enter 0 in Line T in Step 3 and enter net pay (Line I) on Line U in Step 4.

2.2

Net Pay over Minimum
Exemption (amount K) L ____________

Per cent Exemption
(50% of Line L) M ____________

Minimum Exemption
(from Table) N ____________

Preliminary Exemption
(M plus N) O ____________

Maximum Exemption
(from Table) P ____________

Actual Exemption
(lesser of Lines O and P) Q ____________

Step 3: Calculation of Payment to Sheriff

Net Pay (Line H) R ____________

Actual Exemption
(Line Q) S ____________

Payment to Sheriff
(R minus S) T ____________

Step 4: Payment to Employee

Exempt Pay
(Line I or Line Q) U ____________

INSTRUCTIONS TO EMPLOYER:

1. Pay sheriff amount T.
2. Pay employee amount U.
3. Give copy of completed form to employee.
4. Give copy of completed form to sheriff.

TABLE OF MINIMUM AND MAXIMUM EXEMPTIONS

Dependants	*Minimum Exemption*	*Maximum Exemption*
0	800	2400
1	1330	2930
2	1596	3196
3	1862	3462
4	2128	3728
5	2394	3994

[For each dependant in excess of five (5) add $266 to both minimum and maximum]

CHAPTER 10
DISTRIBUTION OF PROCEEDS

A. The Sharing Principle

(1) The Common Law Priority System

The principle governing the distribution of judgment enforcement proceeds at common law was "first come, first served". The first creditor to deliver a writ of execution to the sheriff would receive money raised by the sheriff out of the debtor's assets before creditors who delivered writs later.

The principle was consistent with legal theory regarding the effect of the writ of execution. Delivering a writ of execution to the sheriff gave the creditor a quasi-proprietary interest in the debtor's assets. The assets were "bound" in favour of the execution creditor,[522] and any subsequent writ would "bind" assets that were already bound. The "interest" of the subsequent creditor in the debtor's assets must be subject to the interest of the first.

The same principle applied to other enforcement procedures. The first creditor to take proceedings to attach a debt owed to the debtor bound that debt and took priority over a creditor who attached and bound that same debt later.[523] Charging orders against the assets of a debtor were honoured in the order they were obtained.

A justification advanced for the common law rule is that it rewards diligence:

> . . . it not infrequently happens that where there are or may be several claims against money the person who gets in first gets the fruits of his diligence.[524]

Diligence would not be rewarded, however, if it ended with the filing of the writ. Priority would be lost if the writ was allowed to become "dormant".[525] This would occur if the creditor instructed the sheriff not to levy upon the writ, or not to proceed with the sale of seized assets. A writ could not be used solely to gain priority over other creditors. Priority could only be had by pursuing execution. The concept of dormancy provided a fruitful ground for priority disputes among execution creditors.

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[522] Statute of Frauds (1677), 29 Charles II, c. 3, s. 15.

[523] *Tate* v. *Corporation of Toronto* (1892) 3 P.R. 181.

[524] *James Bibby* v. *Wood* [1949] 2 All E.R. at 21.

[525] Dunlop, *supra*, note 1 at 414.

Historically, the courts recognized the virtue of *pari passu* sharing among creditors in some situations. When the collection process was equitable or dependant upon judicial discretion, the "first come, first served" principle gave way to the sharing principle. In *George Lee and Sons* v. *Olink*, Russell L.J. said:

> . . . where an estate which is the judgment debtor's is insolvent, . . . then a garnishee order nisi should not be made absolute because an equitable remedy such as a garnishee order should not be given if the effect will be to prefer one creditor over another.[526]

The sharing principle was also used in both English and Canadian in bankruptcy legislation.

(2) Creditor's Relief Legislation

In 1880, Ontario enacted the first *Creditors Relief Act*.[527] It "relieved" creditors from the common law priority rule described above. Section 4 stated:

> . . . there shall be no priority between or among creditors by execution from superior or county courts.

The enactment was apparently motivated by the repeal of the federal insolvency law that same year.[528] The Ontario Law Reform Commission has described the history as follows:

> It would appear that the reason for the enactment. . . was the impending repeal of the 1875 *Dominion Insolvent Act* [38 Vict., c. 16 repealed by 43 Vict., c.1] which would have left Ontario and the other provinces without any legislation under which the property of a financially embarrassed debtor could be required to be distributed equitably among all the creditors of the debtor. With the repeal of Canada's only bankruptcy and insolvency legislation, creditors would be forced in every case to fall back on the "first come, first served" regime. . . . Recognizing the need

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[526] [1972] 1 All E.R. 359 (C.A.) at 361. The same sentiment was expressed in *Mainland* v. *Cave* [1892] W.N. 142 (C.A.). In that case, equitable execution was refused because it was sought to gain priority over other creditors where the judgment debtor had died leaving an estate insufficient to pay all his debts in full.

[527] 43 Vict., c. 10.

[528] Although the act contained the declaration that it was not intended to interfere with insolvency laws and was intended to apply "to all debtors whether insolvent or not": *ibid*. s. 28.

> for and the desirability of "a measure of equal distribution of the property of execution creditors", the government of the day called for the enactment of suitable legislation in Ontario "without delay".[529]

Proportional sharing among creditors, which under the federal insolvency legislation had governed only the distribution of the estate of an insolvent person, would apply, under the new act, to the distribution of the proceeds of execution whether or not the debtor was insolvent.

In this first act, the sharing principle was not applied to the proceeds of garnishment proceedings unless the debtor's exigible good or lands were insufficient to satisfy all creditors. In 1886, the application of the principle was expanded — albeit modestly — to the distribution of the proceeds of attachment under absconding debtor legislation and the distribution of money in court belonging to the execution debtor.

All creditors who had writs of execution or "certificates of debt" in the hands of the sheriff at the time of the seizure, or who delivered writs or certificates within one month thereafter, were entitled to share. Certificates of debt could be obtained pursuant to a summary procedure established by the act for the non-execution creditors of execution debtors.

The original act did not contemplate any priority among execution creditors whatsoever. Because of an error in the legislation, there was no priority even for the costs of the creditor who instructed the sheriff to take the steps that produced the distributable fund.[530] Subsequent amendments corrected this error[531] and, in addition, created a special priority for wage creditors to the extent of three months' wages.[532]

The North West Territories was the first jurisdiction to follow Ontario's lead. In 1893, it enacted the Creditors Relief Ordinance,[533] which is the progenitor of the present Alberta legislation.

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[529] Ontario Law Reform Commission, *The Enforcement of Judgment Debts and Related Matters*, Part V (Toronto: OLRC, 1983) at 9 [hereinafter OLRC Part 5]; see also Law Reform Commission of British Columbia, *Report on Creditors' Relief Legislation, A New Approach* (Vancouver: LRCBC, 1979) at 6 [hereinafter LRCBC Creditors' Relief]; Dunlop, *supra*, note 1 at 415.

[530] Section 10 suggested that priority for "the costs of the creditor under whose writ the amount was made" would be granted later in the act, but it was not.

[531] (1886) 49 Vict., c. 16, s. 35.

[532] *An Act Respecting Wages* (1885) 48 Vict., c. 29.

[533] 1893 O.N.W.T. No. 25.

This legislation largely followed the Ontario model, but there were significant differences. It did not, for example, require the sharing of garnishee proceeds in any circumstances, nor was there any equivalent to the Ontario certificate process. Instead, the Ordinance created a judicial discretion to enlarge the period after seizure during which creditors could file executions and join the sharing group.[534] Priority was granted to the instructing creditor, for the costs of the seizure and sale that produced the money being distributed, and to wage claimants in the same manner as the amended Ontario act.

Other provinces adopted the sharing principle over the course of the ensuing decade.[535] By 1903, the only common law province that still retained the common law priority rule was Prince Edward Island, and neither it nor Newfoundland has ever adopted the sharing principle. Common law priority remains in force in these jurisdictions today.

(3) The Present Alberta Legislation

The evolution of the original Ordinance into the present statute has involved significant changes. The scope of application of the sharing principle was enlarged to include the proceeds of garnishment, equitable execution and several other processes. A "certificate process" similar to that contained in the original Ontario act was introduced.

In 1934, the existing Alberta statute was repealed and replaced by the *Execution Creditors Act*,[536] which, with several minor amendments, is in force today. The ordering of the provisions of the act was significantly altered in the new legislation. The declaration of the creditors relief policy ("there shall be no priority among creditors by execution") was removed.

(4) Assessment of the Sharing Principle

The policy foundation of the ECA is the "sharing principle". The proceeds of judgment enforcement processes taken against a debtor should be shared among all the execution creditors of that debtor proportionally according to the amount of their individual judgments. Is this principle appropriate for the distribution of enforcement proceeds?

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[534] There was no direction as to when it would be appropriate to exercise the discretion.

[535] Manitoba, in 1895: *The Queen's Bench Act* 58-59 Vict., c. 6; New Brunswick, in 1902: *Creditors Relief Act*, 2 Ed. VII, c. 17; British Columbia, in 1902: *Creditors Relief Act*, 2 Ed. VII, c. 3; Nova Scotia, in 1903: *Creditors Relief Act*, S.N.S. 1903, c. 14.

[536] S.A. 1934, c. 8.

(a) Physical limitations to sharing

There are situations where the physical limitations of a distribution system make first come, first served the more appropriate rule. Where the commodity being distributed is not capable of division, it provides a practical means of choosing among those who have a rightful claim.

For example, the seats on a bus cannot be subdivided. Distribution of the seats among the passengers waiting at the bus-stop according to the order in which they arrived there seems fairer than random selection. It is certainly more orderly — and less violent — than a frenzied rush to the bus door and more practical than seats being allocated by the driver on the basis of the greatest need to ride.

The first come, first served principle is also used when the commodity is divisible and the supply is sufficient to satisfy all claims fully. For example, at a busy restaurant, the physical limits of staff, equipment and space usually render it impossible to deliver meals to all customers at the same time. First come, first served brings equity and order to the situation. In such cases, it is the attention of the server that is being distributed. The physical circumstances make it impossible to divide the burden of waiting for that attention equally.

Neither of these physical limitations affects the distribution of judgment enforcement proceeds. The commodity being distributed — money — is readily divisible.[537] If there are staff, equipment or space limitations in the sheriff's office, they do not prevent equal division of the burden of waiting for full satisfaction among execution creditors.[538]

(b) Ranking the morality of claims

If there is no such physical limitation, then the first come, first served principle is preferable only where there is greater merit, morality or justice to the claim of the first creditor who delivers a writ to the sheriff.

Clearly, the claims of execution creditors are not all of equal legal or moral merit. Some have been recognized legislatively as deserving preference. Among those that are of equal legal merit, there are some that are arguably entitled to a moral preference; however, a ranking of claims according to their respective moral merits cannot be made without significant investigation of the circumstances. Even then, such a ranking can be unreliable. It is impractical to build into the system a means of determining and extending preference on such grounds.

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[537] Although the original quantity might be so small that the portions after division are insignificant to the individual creditors and division might not be warranted.

[538] The proposition that the sharing principle is more expensive to administer than the first come, first served principle is addressed below. For present purposes, it is enough to observe that there are no physical limitations that make administration of the principle impossible.

This is so whether the distribution system is founded on the sharing principle or the first come, first served principle. Neither distinguishes between claims of unequal merit. The characteristics that make one creditor morally entitled to preference over another are not necessarily found in the first creditor to deliver his writ to the sheriff.

(c) The reward of diligence

The traditional justification for the first come, first served principle is that it rewards diligence. The sharing principle, at least as implemented at present, might tend to discourage diligence and initiative, since the product must be shared with creditors who have done nothing but file a writ. Does this provide a basis upon which to prefer the first come, first served system?

This factor was of particular concern to the British Columbia Law Reform Commission when it considered the fairness of the sharing principle as implemented in the British Columbia legislation:

> In its pursuit of equality among unsecured creditors a *Creditors' Relief Act* is capable of yielding results which, in many cases, might be regarded as unfair. The basis of the act is that a creditor whose enforcement measure directly or indirectly produces money, should be required to give up that money for distribution among all unsecured creditors who establish claims. In effect, the fruits of the labour of creditor A must be yielded up for the benefit of creditors B and C as well.
>
> For example, debtor D owes $2,000 to A, $10,000 to B and $5,000 to C. If A proceeds to judgment against D and through various enforcement measures realizes $1,700, that money would be distributed as follows:
>
> | | |
> |---|---|
> | A | 200 |
> | B | 1000 |
> | C | 500 |
>
> Even if A were adequately compensated for the costs of his enforcement measure (which is not the case under the present act) he might be forgiven for regarding B and C as "parasites."
>
> . . . While the policy of equality may be sound in the abstract, if the pursuit of it encourages and indeed

> rewards parasites, is commercial morality significantly advanced?[539]

In our analysis, these observations do not constitute an indictment of the sharing principle; in fact, they confirm the equity of that principle. The judgment enforcement proceeds distribution system divides up more than judgment proceeds. It also distributes the effort and the cost of the processes that produce distributable funds and those that fail to produce anything.

In the present legislation, the sharing principle is not applied to the distribution of the enforcement effort. The burden of that effort is borne by the person who undertakes it. Only a portion of the actual cost of successful enforcement efforts is paid to the creditor who undertook them before the distribution to other creditors is made. Where enforcement efforts are unsuccessful, a portion of their cost can be added to the judgment of the creditor who initiated them. This creditor might recover those "costs" if there is a further distribution to creditors; but neither the successful nor the unsuccessful creditor receives any additional compensation for the effort undertaken.

Therefore, the aspect of creditors relief legislation that the Law Reform Commission of British Columbia thought unfair is one that is unaffected by the sharing principle. Therefore, although this might be a deficiency in the legislation, it does not reflect negatively on the sharing principle.

(d) Creditor acceptance of the sharing principle

Credit is a fundamental component of commerce and the economy. It is essential that credit grantors accept and have confidence in the system by which debt obligations are enforced. Any erosion of that acceptance and confidence might have significant undesirable effects.

The Law Reform Commission of British Columbia suggested that a comprehensive and efficient implementation of the sharing principle in an improved statute could seriously erode creditor acceptance of the system.[540] It suggested that the present statute is not so much accepted as tolerated by British Columbia credit grantors. They tolerate it because there are so many imperfections in the statute's implementation of the sharing principle — so many ways that creditors can achieve priority and avoid sharing. If comprehensiveness and consistency of application were introduced into the existing regime, the sharing principle might become unacceptable.

It is unlikely that such a situation exists in the Alberta context. The ECA is more comprehensive than its British Columbia equivalent. The former statute applies to garnishee proceedings; the latter does not. Although there are enforcement processes and situations to which the Alberta statute does not apply, or to which its application is unclear, these are of minor significance compared to execution and garnishment.

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[539] LRCBC Creditors' Relief, *supra*, note 529 at 17.

[540] *Ibid*.

It is doubtful that Alberta creditors hold any perception that a significant opportunity exists to avoid sharing. In the 96 years that the sharing principle has been in effect in this jurisdiction, it has had no detrimental effect on the willingness of creditors to grant credit. Credit has flourished under the sharing regime, and this is as likely because of, as in spite of, the sharing principle.

Alberta creditors might criticize some aspects of the present system, such as its treatment of the creditor who took the initiative. They might object to reforms that would broaden the application of the system, such as applying it to direct payments from debtor to creditor. Such criticisms and objections, however, do not challenge the policy foundation of the present statute — the sharing principle.

(e) Administrative efficiency

Surveys carried out by the Law Reform Commission of British Columbia revealed remarkable diversity and inconsistency in the application of the British Columbia *Creditors' Relief Act* by British Columbia sheriffs.[541] Similar surveys of Alberta sheriffs might well show the same thing. The ECA is hardly a model of good drafting. If its application were found to be inconsistent and complicated, no one would be surprised.

We are certain, however, that if such deficiencies exist they do not impede effective application of the policy of the act and are capable of elimination.

In any event, administrative inefficiencies would raise concerns about the implementation of the sharing principle, not necessarily about the principle itself. We think that the sharing principle has no intrinsic quality that makes it incapable of consistent and efficient application.

As to cost, the sharing principle is probably more expensive to administer than the common law system. Significantly more extensive and sophisticated records must be kept. Occasionally, there are complicated distribution proposals to prepare. The act contemplates several opportunities for judicial intervention where the sheriff's participation is required.

The administrative cost, however, has not been considered prohibitive, or even significant, in the long history of the legislation in Alberta. Modern technology could be employed to simplify and reduce the cost of record keeping. Further, since enforcement processes are undertaken for all execution creditors, the system avoids the cost of wasteful repetition of effort.

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[541] *Ibid.*, Appendix B at 56.

In balance, the relative complexity and cost of the sharing system do not diminish its practical acceptability.

(f) Sharing principle in insolvency legislation

In 1919, the federal government enacted the *Bankruptcy Act*,[542] which invokes the sharing principle by requiring proportional division of an insolvent estate among creditors. The void created by the repeal of the federal insolvency legislation in 1880, which had motivated the enactment of the first creditors relief legislation, ceased to exist.

The British Columbia Law Reform Commission reasoned[543] that the availability of the sharing principle in the federal legislation justified its removal from the legislation governing the distribution of judgment enforcement proceeds. The commission thought that sharing is appropriate only where the debtor's estate is insufficient to satisfy all creditors. If subsequent enforcement efforts will produce funds sufficient to satisfy the other creditors, there is no point in making the first creditor undertake those efforts or waiting until another creditor does. If such efforts are unlikely to produce sufficient proceeds, the other creditors can invoke the sharing principle by taking proceedings under the *Bankruptcy Act*.[544]

We are not attracted to this reasoning. Rarely is it obvious whether or not subsequent enforcement processes will produce funds sufficient to satisfy all execution creditors. Probably, the greater the number of executions that the debtor allows to remain unsatisfied, the less the likelihood that further proceeds will be produced. It seems reasonable, in these circumstances, to design the distribution system on the assumption that there will be insufficient recovery to satisfy all creditors.

We do not think that it is a significant objection that early creditors are required to wait until subsequent efforts have produced distributable funds. The duration of the wait is kept to acceptable limits by the requirements that seizure and garnishment be undertaken for the total amount of subsisting executions and that distributions occur in a timely manner after the fund is produced.

We consider it proper to distribute the wait for full satisfaction evenly among those who wait. As there is no particular virtue in being first in line, it is inequitable to impose a longer wait to those later in line.

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[542] *Bankruptcy Act*, S.C. 1919, c. 36.

[543] LRCBC Creditors' Relief, *supra*, note 529 at 17, 20.

[544] Section. 24 of which makes leaving an execution unsatisfied for up to four days preceding an advertised sheriff's sale an act of bankruptcy entitling any creditor to file a petition, assuming that the total debts exceed $1000.

We should note that the constitutionality of the sharing principle in provincial execution legislation was affirmed by the Privy Council in 1894.[545]

(g) Conclusion

We consider the sharing principle to be preferable to the first come, first served principle for application to the distribution of enforcement proceeds.

This conclusion is supported by the response to the tentative recommendation to retain the sharing principle contained in our Report for Discussion No. 3, *Remedies of Unsecured Creditors*, May 1986. The majority of respondents were in favour of retention. Most of these, but not all, were also in favour of improvements to the treatment of the active creditor. A few other respondents were grudgingly prepared to acquiesce in retention. The analysis above has addressed the points raised by the few who supported abolition of the principle.

The sharing principle has been assessed recently by several other law reform agencies.[546] All except the Law Reform Commission of British Columbia have concluded that it is appropriate as the governing policy for the distribution of enforcement proceeds.

RECOMMENDATION 135:

THE SHARING PRINCIPLE

The existing policy foundation of the ECA, the sharing principle, should be retained. The proceeds of enforcement processes against a judgment debtor should be shared among the judgment creditors of that debtor proportionally according to the amount of the creditors' individual judgments.

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[545] *Attorney General of Ontario* v. *Attorney General of Canada* [1894] A.C. 189 (Voluntary Assignments Reference).

[546] New Brunswick Remedies, *supra*, note 146; LRCBC Creditors' Relief, *supra*, 529; OLRC Part 5, *supra*, note 529; New South Wales Law Reform Commission, *Draft Proposal Relating to the Enforcement of Money Judgments*, 1975; Payne Committee, *supra*, note 42.

B. Application of the Sharing Principle

(1) All Enforcement Processes

What monies should be shared under the sharing principle? Should there be any enforcement proceeds that are not shared?

The first creditors relief legislation in this jurisdiction required only money raised by the sheriff under a writ of execution to be shared.[547] The proceeds of enforcement steps that did not historically involve the sheriff, such as garnishment and equitable execution, were not subjected to the sharing principle.

Gradually, the scope of application was enlarged by amendment. In 1898, it was made clear that the proceeds of a sale of land under execution were intended to be shared.[548] The principle was also extended to the proceeds of attachment of the property of an absconding debtor. In 1910 the principle was extended to the proceeds of equitable execution, and the sheriff was authorized to apply for an order attaching a debt owed to an execution debtor where the debtor's exigible property was insufficient to satisfy all the executions.[549] The principle was applied also, at least by inference, to money paid to the sheriff by a debtor without any execution sale having occurred.[550]

The *Execution Creditors Act* enacted in 1934[551] extended the sharing principle to the proceeds of garnishee proceedings.[552] This was the final enlargement of the scope of application of the principle, except for a 1952 amendment to the *Seizures Act*,[553] which provided that excess proceeds of a sale of property seized under a power of distress would be distributed among execution creditors pursuant to the sharing principle.

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[547] *An Ordinance to Abolish Priority Among Execution Creditors*, 1893 O.N.W.T., No. 25, s. 3(a).

[548] See *infra* at 358.

[549] *Creditors' Relief Act* S.A. 1910, c. 4, ss 23,35.

[550] *Ibid*. s. 19(3), which directed that where the debtor voluntarily paid the sheriff a sum sufficient to satisfy all subsisting writs (or where there was only one subsisting execution and the voluntary payment was insufficient to satisfy it), the sheriff was to pay the money directly to the execution creditors (or creditor) without waiting for the expiration of the "grace period", which at that time was one month, and without making the entry in his records required for receipts that were to be shared. Although the section did not expressly say so, presumably, if such a payment was insufficient to satisfy all the subsisting writs, the sheriff would make a *pari passu* distribution of it after the expiration of the grace period.

[551] *Execution Creditors Act*, S.A. 1934, c. 8.

[552] *Ibid*. ss 3, 6.

During the course of the past century, the scope of application of the principle has gradually expanded to the point where today it applies in seven situations:

a. the seizure of property under a writ of execution;[554]

b. the seizure of the property of an absconding debtor under a writ of attachment;[555]

c. the proceeds of garnishee proceedings;[556]

d. the proceeds of seizure of property in "proceedings in the nature of equitable execution";[557]

e. funds in court belonging to the execution debtor;[558]

f. payments made to the sheriff without there having been a seizure;[559] and

g. excess proceeds of a sale of property seized under a power of distress to which the *Seizures Act* applies.[560]

The scope of application of the sharing principle is not, however, as certain and precise as this list suggests. The legislation, and judicial interpretations of it, give rise to several uncertainties. For example:

a. Although the early legislation clearly was intended to apply to the proceeds of execution sale of land, there is no provision to that effect in the present act. Judicial doubt has been expressed as to whether or not such proceeds are required to be shared.[561]

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[553] *An Act to Amend the Seizures Act*, S.A. 1952, c. 84, s. 3.

[554] ECA, s. 2(a).

[555] *Ibid*. s. 2(b).

[556] *Ibid*. s. 2(c).

[557] *Ibid*. s. 2(d).

[558] *Ibid*. s. 7.

[559] *Ibid*. s. 13.

[560] *Seizures Act*, s. 46.

b. Although section 2(b) of the ECA requires the sharing principle to be applied to the proceeds of seizure under a writ of attachment (presumably meaning a writ of attachment under Rule 485, which authorizes seizure before judgment of the property of an absconding debtor), no sale of the property seized under such a writ is permitted until the plaintiff has obtained judgment and issued execution. Therefore, the section is either inconsistent with Rule 485 or redundant.

c. In *Giguere* v. *Pilon*,[562] the court held, albeit *obiter*, that the proceeds of equitable receivership were not subject to the sharing principle. This view is inconsistent with section 2(d) of the ECA, especially when the legislative ancestor of that provision is considered.[563] It expressly applied the sharing principle to the monies received by a receiver appointed by way of equitable execution.

d. The uncertainty described previously,[564] as to whether the principle applies where the sheriff receives a voluntary payment that is insufficient to satisfy all the executions that he holds, has been continued in the present section 13.

There are also a few situations to which the sharing principle has a limited application or does not apply at all:

a. It probably does not apply to the proceeds of a charging order under the *Judgments Act*, 1838, a remedy that is available but rarely invoked in Alberta.[565]

b. The principle does not apply to voluntary payments made to an execution creditor to secure discharge of a writ of execution against the debtor's land to permit alienation of the land unencumbered by the writ.[566]

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[561] *Seel Mortgage Investment Corporation* v. *Tri-Dell James Const. Ltd.* (1981) 32 A.R. 299 (Q.B.) [hereinafter *Seel Mortgage*]. In that case, and more recently in *Province of Alberta Treasury Branches v. Floral Holdings Ltd. et al.* (1989) 65 Alta. L.R. (2d) 6 (Q.B.), it was held that the ECA does not govern the distribution of the surplus in a mortgage foreclosure among creditors with writs registered against the title to the foreclosed land.

[562] (1976) 66 D.L.R. (3d) 693 (Alta. S.C.T.D.).

[563] *Creditors' Relief Act*, S.A. 1910, c. 4, s. 23.

[564] For a discussion of voluntary payments, see note 550.

[565] (U.K.) 1 & 2 Vict., c. 110; see also Dunlop, *supra*, note 1 at 428.

c. The principle does not apply to payments made by an execution debtor directly to an execution creditor.

d. The application of the principle to the proceeds of interpleader proceedings is limited to sharing among those creditors who participated in the proceedings.[567]

While there might be disagreement as to whether the sharing principle should be applied to the situations identified in the previous paragraph, we believe that it would not now be controversial to require application of the principle to all money that comes into the sheriff's hands by virtue of his holding a writ of enforcement against a judgment debtor, regardless of the enforcement process that produced the fund, be it seizure, garnishment, enforcement against land or receivership, or any other court-ordered enforcement process.

RECOMMENDATION 136:

APPLICATION TO ALL ENFORCEMENT PROCESSES

All monies that come into the sheriff's hands because of the existence of a writ of enforcement, regardless of the process by which the money was raised, should be distributed among enforcement creditors according to the sharing principle.

(2) Direct Payments to Creditors

The sharing principle does not apply at present to payments made by the debtor directly to the creditors.[568] Under the present system, a debtor can get rid of an aggressive creditor who is threatening seizure or other enforcement process by making payment directly to the creditor. The aggressive creditor might well be prepared to accept less than full satisfaction if the payment exceeds the creditor's probable share on a distribution to which the sharing principle applied.

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[566] *Land Titles Act*, s. 123(c).

[567] ECA, s. 33.

[568] The only voluntarily paid money that is required to be shared under the present legislation is money paid to the sheriff by the debtor or someone else without the sheriff having effected a seizure. ECA, s. 13.

There can be no such advantage to either the execution debtor or the creditor if the payment is made after commencement of an enforcement process. Section 4(5) of the ECA prohibits release of seizure on the instruction of one creditor if the sheriff holds subsisting executions for other creditors. Section 15 prohibits the termination of other enforcement processes in similar circumstances.

The discharge of a writ of execution at the Land Titles Office, in return for direct payment by the debtor to the creditor, is contemplated by the *Land Titles Act*. Section 123 provides that a writ of execution ceases to bind the debtor's land upon the filing of a discharge executed by the execution creditor. There is no provision requiring the registration of the writ to be maintained for the benefit of other execution creditors.

The debtor is not completely free to choose which of several creditors to pay. The *Fraudulent Preferences Act* is intended to prevent the application of the debtor's assets for the exclusive satisfaction of one or more of his or her creditors to the prejudice of the others. The statute's application, however, is confined to payments or transfers made when the debtor is insolvent, unable to pay debts in full, or on the brink of insolvency. Its operation is also subject to several exceptions, some of which are notoriously uncertain and potentially irrational in scope. The effectiveness of the statute in preventing direct payments that would prejudice some creditors is questionable.

Should the sharing of direct payments be required? We do not think so. Such a requirement would remove the motivation for making them. No relief would be obtained by making payment in response to a creditor's threat of enforcement. Threats to initiate enforcement processes might decrease, but the actual use of enforcement processes would increase. In any event, we do not think that such a requirement could be enforced effectively.

A requirement that direct payments be shared would likely be extremely unpopular with judgment creditors. This was considered significant by the Ontario Law Reform Commission, which recommended against application of the sharing principle to direct payments.[569]

Obviously, the sharing principle cannot apply to all transfers of a debtor's wealth to creditors. A demarcation must be drawn between situations to which sharing applies and ones to which it does not. Payments made by debtors to creditors who have not obtained judgment or execution, and payments made in the ordinary course of business, fall on the "not to be shared" side. Practicality dictates that payments made in response to a demand letter or other extrajudicial pre-action collection effort should also be excluded from sharing.

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[569] OLRC Part 5, *supra*, note 529 at 40.

Voluntary payments made to a creditor who has judgment and execution should also be placed on the not to be shared side of the line. The taking of judgment and issuing of execution should not work to the prejudice of a creditor. An execution creditor should not be in a worse position in respect of direct payments than one who has not proceeded to judgment or execution. The system should not provide even more encouragement than it does at present for creditors to take aggressive extrajudicial collection steps in preference to going to judgment.

We conclude that the demarcation should not be made on the basis of whether or not an execution has been issued. It should be made on the basis of whether or not the debtor's assets have come into the hands of the sheriff either as a result of an enforcement process or as a voluntary payment. Direct payments to execution creditors compare more closely to direct payments to non-execution creditors to which sharing cannot apply than to the proceeds of enforcement processes to which sharing does apply.

Like the Ontario Law Reform Commission, we look to the legislation relating to impeachable transactions to provide an effective safeguard against unfair allocations of the debtor's wealth. We recognize that the present Alberta legislation, the *Fraudulent Preferences Act*, is in need of considerable improvement if it is to provide a sufficient safeguard.

RECOMMENDATION 137:

DIRECT PAYMENTS

The sharing principle should not be applied to direct payments made by an execution debtor to an execution creditor.

(3) "Subsisting Executions"

The ECA directs the sheriff to distribute enforcement proceeds among those creditors for whom he holds "subsisting executions".[570] A subsisting execution[571] is one that either has been received by the sheriff within the year preceding the distribution or in respect of which he has received a "renewal statement"[572] in the preceding year.[573]

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[570] ECA, s. 10(1)(b).

[571] *Ibid*. s. 1(t).

[572] *Ibid*. ss 28, 29. The statement must disclose any satisfaction of the debt or any agreement by the creditor to stay or suspend proceedings under the writ. If there has been no such activity, the notice must state the amount "leviable" under the writ.

The concept of the subsisting execution was first introduced in the 1934 Alberta act. Alberta and the Northwest Territories are the only jurisdictions to use it. In the other jurisdictions, creditors with executions are entitled to share during the entire duration of their executions; however, the writ expires after a shorter period than in Alberta.[574] If the debt has not been satisfied when the writ expires, a new writ can be issued and entitlement to share is restored.

The effect of the one-year rule is to require some activity on the part of each execution creditor to maintain eligibility to share. The level of required activity, however, is low. The creditor need only file a "renewal statement" annually.[575] Creditors who at common law would have lost priority for allowing their writs to become "dormant" are not eliminated from the sharing group. This is a source of considerable frustration to creditors who actively pursue enforcement. Later in this report, we recommend reforms that we think will substantially reduce that frustration.[576]

The requirement of the renewal statement, and the similar requirement, in section 28 of the ECA, that a creditor advise the sheriff of any payment received on account of the debt, also ensures a measure of certainty as to the amount outstanding on each execution at the time an enforcement procedure is undertaken or a distribution is made. A creditor who fails to advise the sheriff when the amount owing on the creditor's writ decreases is liable for damages incurred by any resulting excessive seizure or attachment.[577]

We believe that it is appropriate to limit entitlement to share to those enforcement creditors whose writs have been filed or "renewed"[578] in the year preceding the distribution. Such a requirement promotes activity, albeit minimally, and certainty as to the amount owing to each creditor entitled to share. We consider this worthwhile. The present concept of the subsisting execution should continue to limit entitlement to share in the reformed legislation.

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[573](...continued)

[573] Under Rule 363, a writ of execution expires on the expiration of the judgment upon which it is based. A judgment expires, unless renewed, when the period during which an action could be brought on it ends. If more than a year has passed since a writ of execution or a renewal statement was delivered to the sheriff, the writ is not subsisting even though it has not expired.

[574] One year in British Columbia, Nova Scotia and the Yukon Territory; two years in New Brunswick and Manitoba; six years in Ontario.

[575] ECA, s. 29.

[576] See *infra* at 350 ff.

[577] ECA, s. 30.

[578] In our recommendation, we have substituted the words "statement of status" for "renewal statement".

Currently, section 28 of the *Seizures Act* provides that an execution creditor who enters into an agreement whereby proceedings under a writ of execution are to be stayed or suspended must so advise the sheriff. There is, however, no indication as to whether or not the sheriff is to include a creditor who has entered into an agreement to that effect in subsequent distributions. We think that it should be made clear that the answer is "No". Such a writ should not be considered subsisting after such advice has been given.

RECOMMENDATION 138:

SUBSISTING WRITS OF ENFORCEMENT

Distribution of enforcement proceeds should be made only among those creditors whose writs of enforcement or statements as to the status of the judgment debt owed to them have been delivered to the sheriff and have been registered in the Enforcement Registry within the year preceding the distribution.

A writ of enforcement should be considered "subsisting" until one year has elapsed from either the date of its entry in the Enforcement Registry or the date on which the most recent statement of status was registered in the Enforcement Registry.

The present requirements, that a creditor advise the sheriff of any payments received in satisfaction of the judgment debt and of any agreement whereby proceedings under a writ or execution are to be stayed or suspended, should be continued. In the latter case, the writ should cease to be subsisting during the suspension.

(4) Territorial Limitation

The present law imposes a second limitation on eligibility to share in a distribution of enforcement proceeds. Only those execution creditors who have subsisting writs filed with the sheriff making the distribution are entitled to share.[579] An execution creditor who has a subsisting execution in the hands of the sheriff of another judicial district will not be included in the distribution. To be certain of inclusion in every possible distribution, a creditor would have to maintain a subsisting writ with each of the sheriffs in Alberta.

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[579] ECA, s. 10(2).

We have proposed that the writ of enforcement be effective throughout Alberta. The delivery of a writ of enforcement to one sheriff will bind the debtor's assets throughout the province, not just in the judicial district of the sheriff to whom it is delivered.

The distribution of enforcement proceeds should also be province wide. When a sheriff makes a distribution, every creditor who has a subsisting writ of enforcement registered in the Enforcement Registry should be included, regardless of whether or not the writ was filed originally with the sheriff making the distribution.

RECOMMENDATION 139:

PROVINCE WIDE DISTRIBUTION

Distribution of enforcement proceeds should be made on a province-wide basis. Every creditor who has a subsisting writ of enforcement against the debtor in the Enforcement Registry should share, regardless of the sheriff to whom the writ was delivered originally for registration in the Enforcement Registry.

(5) The Certificate Procedure

The ECA contains three provisions that ameliorate the potential harshness of excluding creditors who do not have subsisting executions. These are the "certificate procedure",[580] the "grace period"[581] and the "reserved share"[582] provisions. We conclude that none should be retained in the reformed legislation.

The certificate procedure is a summary procedure by which a creditor can obtain a writ of execution and be admitted to the sharing group. The procedure can be invoked by a creditor who has not obtained judgment and whose debt is overdue, if the sheriff has seized the debtor's goods under a writ of execution or if a debtor has allowed ". . . an execution against his lands to remain unsatisfied for 9 months after it has been placed in the sheriff's hands".[583]

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[580] *Ibid*. ss 18-26.

[581] *Ibid*. s. 10(2).

[582] *Ibid*. s. 41(1).

The creditor serves the debtor with a notice that the procedure is being invoked and with an affidavit setting out the particulars of the claim. The creditor then serves the notice on creditors who has a subsisting execution against the debtor and files the affidavit, notice, and proof of service with the clerk, along with a certificate from the sheriff showing that the preconditions to invoking the procedure exist and listing the creditors who have subsisting executions.[584] Judgment is issued 10 days after service unless the debtor or another creditor disputes the claim within that time.[585] Therefore, the process saves five days on the minimum time required for the normal process leading to default judgment.[586]

The debtor, or another creditor, may dispute the claim by filing an affidavit, stating the grounds of dispute, within the 10 days following service.[587] The creditor then has a further 10 days in which to apply to a judge for a summary determination of the claim.[588] The judge can either allow or disallow the claim, but it is not contemplated that he or she can direct the trial of an issue.

In practice, the certificate procedure is used rarely. Several explanations are possible:

a. creditors are generally unaware that the procedure exists;

b. creditors do not wish to give other creditors, as well as the debtor, the opportunity to dispute their claims;

c. creditors do not wish to risk summary dismissal of their claims; and

d. the procedure is not significantly more efficient than the normal default or summary judgment procedures.

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[583] *Ibid*. s. 18. Rule 347 states that every writ of execution is issued against both the goods and lands of the debtor, so the reference to "execution against land" is superfluous.

[584] ECA, s. 19.

[585] *Ibid*. s. 20(1). Longer periods are prescribed where service is effected out of Alberta.

[586] A default judgment can be obtained 15 days after the date of service of a statement of claim if the defendant files no defence: Rules 85, 142.

[587] ECA, s. 21.

[588] *Ibid*. s. 22.

The Ontario Law Reform Commission recommended the abolition of the certificate process on grounds of principle.[589] It acknowledged that, by providing an easy means of joining the sharing group, the certificate process discourages creditors from moving against the debtor's assets quickly to avoid sharing, and allows creditors to be accommodating to defaulting debtors. It observed that the procedure reduces the likelihood of one creditor fortuitously gaining advantage over another whose action has foundered in procedural doldrums.

Nevertheless, it could not:

> . . . sanction the scheme of distribution that allows non-judgment creditors to take advantage of sometimes costly and time consuming efforts of judgment creditors responsible for the realization of enforcement proceeds.[590]

This argument might be relevant to an assessment of the sharing principle, but it does not support a recommendation to abolish the certificate procedure. It is no more unfair or frustrating to an execution creditor to have to share the proceeds of his or her efforts with a non-execution creditor than with an inactive execution creditor. That unfairness and frustration should be addressed by introducing greater equity into the distribution of the burdens of the enforcement process.[591] Abolition of the certificate process would not address them appropriately.

We make the same recommendation, for a purely pragmatic reason, as the Ontario commission. The certificate procedure is not used; it is excess legislative baggage. This is sufficient reason to abolish it.[592]

RECOMMENDATION 140:

THE CERTIFICATE PROCESS

The certificate procedure contained in the ECA should be abolished.

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[589] OLRC Part 5, *supra*, note 529 at 43.

[590] *Ibid*. at 44.

[591] See *infra* at 350 ff.

[592] In Report for Discussion, *supra*, note 4 at 348, 349, we tentatively recommended the abolition of the certificate process. We received only one comment on that recommendation. The comment was in agreement with it.

(6) The Grace Period

The second ECA provision, which ameliorates the harshness of excluding creditors who do not have subsisting executions, is the 14-day "grace period".[593] Creditors who deliver a writ of execution or renewal statement to the sheriff during the 14 days following the sheriff's receipt of a distributable fund are eligible to participate in the distribution.[594]

A grace period has always been a feature of the creditors relief legislation in force in this jurisdiction, although its length has fluctuated. The other provinces' creditors' relief statutes also contain grace periods, which range from 14 days to two months.

The grace period provision could have been intended to serve either or both of two purposes. It might have been intended to give a creditor who learns that the sheriff is about to make a distribution a chance to join the sharing group, or it might have been intended to prevent the arbitrary exclusion of creditors who were about to file executions when the sheriff received a fund for distribution. We think that it fails to achieve either.

Fourteen days is not long enough for a creditor to obtain judgment by default using the normal processes. It is probably not even long enough for the operation of the certificate procedure unless service can be effected efficiently.

Even if the grace period were long enough, that the sheriff has received money and that the grace period is running is not likely to come to the attention of other creditors. Section 9 of the ECA requires the sheriff to record every receipt. Presumably, the record is available for the inspection of creditors,[595] but it is not common practice for creditors to inspect it. A vigilant creditor would probably consider it more worthwhile to inspect the files of the sheriff and the clerk relating to the debtor so that he or she could learn about enforcement proceedings taken by other creditors before they produced money for distribution. Such a creditor could likely have an execution in the sheriff's hands before the grace period commenced. It would be purely fortuitous if a delay in getting judgment was overcome and execution was obtained during the grace period.

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[593] ECA, s. 10(2)(b).

[594] Section 23 of the ECA is a parallel provision. It provides that any creditor whose writ expires during the grace period shares anyway. Presumably, expiration covers both becoming non-subsisting and going out of force because of the expiry of the judgment upon which the writ is based.

[595] Although the act does not say that it is.

We expect, in fact, that it is usually fortuitous when a creditor joins the sharing group during the grace period.[596] The vast majority of creditors do not have any idea before commencing action against a debtor whether or not other creditors have executions against the debtor — much less whether there have been enforcement efforts made.

Most suits are reactions to a debtor's default, not to the enforcement actions undertaken by another creditor. Accordingly, it is a matter of chance whether an execution is delivered before the receipt of money by the sheriff, during a grace period, or after the 14 days has expired.

The delayed "cut-off" established by the grace period is no less arbitrary than a deadline established at the time that the sheriff receives the distributable fund.

We think that the grace period provision does not serve any useful purpose and should be abolished. The execution creditors entitled to share should be those who have subsisting executions in the sheriff's hands at the time that a distributable fund is received by the sheriff.

The same conclusion was reached by the Ontario Law Reform Commission.[597] In the New Brunswick Report, it is recommended that the first distribution of enforcement proceeds be made 45 days after the commencement of enforcement proceedings. During that time, other creditors could invoke a process similar to the certificate procedure to acquire entitlement to share.[598] We do not think that the proposal removes the basic flaw of the grace period — those excluded by the lapse of the 45 days are excluded no less arbitrarily than those who would be excluded if the cut-off were the day that the sheriff received the distributable fund.

RECOMMENDATION 141:

THE GRACE PERIOD

The 14-day grace period provision should be abolished. The sheriff should make distribution to those creditors in respect of whom he holds a subsisting writ of enforcement at the time that he receives a fund for distribution.

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[596] An Ontario survey concluded that there were few such cases. OLRC Part 5, *supra*, note 529 at 50.

[597] *Ibid*.

[598] New Brunswick Remedies, *supra*, note 146 at 320.

(7) The Reserved Share

The third mechanism that exists to assist creditors who have not passed the "judgment post" when the sheriff receives funds to distribute is the reserved share provision. This is contained in section 41 of the act:

> 41(1) The judge may direct the sheriff to levy for an amount sufficient to cover a claim that is in dispute or part thereof.
>
> (2) If it appears to the judge that it is improbable that the debtor has other sufficient property, he may direct the sheriff to retain in his hands during the contesting of a claim the share of money in his hands that, if the claim is sustained, will be apportionable to the claim or part thereof.
>
> (3) An order to levy under this section confers on the sheriff the same authority as he has under an execution.

The provision was contained in the original *Creditors Relief Act* enacted by Ontario[599] and has been carried forward throughout the development of the present Alberta legislation. We have been unable to find any judicial consideration of it. The Edmonton sheriff's office is unaware of the section ever having been used.

We believe that the provision should be abolished. To implement the sharing principle in a practical way, it has been necessary to confine the group of creditors who share to those who have obtained judgment. Creditors who have not sued, or who have not had their claims reduced to judgment, are excluded. There is considerable arbitrariness to this cut-off. But that cannot practically be avoided without the risk of unfairness. It would be unfair, for example, if a share was reserved under section 41 for a creditor who happened to know of enforcement proceedings undertaken by other creditors, but not for another creditor who did not know of the enforcement proceedings but who obtained judgment before the creditor for whom a share was reserved.

Creditors who qualify at present for a reserved share can invoke the *Bankruptcy Act* if it appears that the debtor's assets are insufficient to satisfy all the claims upon them. We think that the remedy for creditors in the situation contemplated by section 41 should be left to the bankruptcy system.

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[599] *Creditors Relief Act* (1880) 43 Vict., c. 10, s. 18.

RECOMMENDATION 142:

THE RESERVED SHARE

Section 41 of the ECA, which contemplates a judge ordering the sheriff to levy in respect of a claim that a debtor has disputed and the sheriff holding a "reserved share" of the proceeds for the creditor until the claim has been reduced to judgment, should be abolished.

(8) The Crown

The ECA does not contain a provision stating that the Crown is bound by the act. Section 14 of the *Interpretation Act* provides that legislation does not bind the Crown or affect Crown rights or prerogatives unless the legislation expressly states otherwise. The Court of Appeal of Alberta, however, has recently held that the Crown is bound by the provisions of the ECA, notwithstanding the absence of such a provision.

In *Royal Bank of Canada* v. *Black and White Developments Ltd. and Alberta Mortgage and Housing Corporation*,[600] AMHC had issued a writ in 1984 and the Royal Bank had issued one in 1986. Property had been seized and sold on the instructions of the Royal Bank. The sheriff proposed to share the proceeds between the two writ holders. On application by the Royal Bank, it was held by the chambers judge that the Crown was not bound by the ECA by reason of section 14 of the *Interpretation Act*, and that, since it was not bound by the act, it could not claim the benefit of the act.[601] The chambers judge purported to distribute the proceeds according to common law priority. The Royal Bank was held entitled to the entire fund.[602]

On appeal, it was held that, where the Crown chooses to use the general law applicable between subject and subject, it is bound by all the provisions of that law. By filing a writ of execution, AMHC had chosen to use the law applicable between subject and subject. The court observed that if the Crown wanted to take advantage of its prerogatives it ought to have used the writ of extent or other special procedures used previously by the Crown to collect its debt and not available to the subject.[603] The Crown had not resorted to those procedures. It had waived whatever common law prerogative it might have had.

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[600] (1988) 60 Alta. L.R. (2d) 31 (Alta. C.A.); leave to appeal refused (1989) 100 A.R. 394 (S.C.C.) [hereinafter *Black & White*].

[601] (1986) 43 Alta L.R. (2d) 322.

[602] The court's application of the common law, however, might be open to question. It was held that, at common law, the creditor who instructs the seizure receives the benefit. In fact, at common law, the creditor who first files a writ receives the benefit. The distribution ordered by the chambers judge is proper only if it had been held that, on common law principles, the AMHC writ, which was filed first, was dormant. Dormancy is not addressed in the judgment.

The court also held that the Crown's prerogative to have its debt paid in priority to other debts of equal degree is not available when the Crown chooses to employ a writ of execution to collect its debt. Priority among execution creditors was abolished by the *Creditors Relief Act* and has not been restored. Section 12(c) of the ECA does contemplate priority in distributions for persons entitled to be paid in preference to other creditors. The court said:

> When the Crown elected to be bound by the *Execution Creditors Act*, it accepted the provision of the Act eliminating all priorities, including its own. The Crown as execution creditor is entitled to its pro rata share and no more, on the same basis as every other execution creditor.[604]

We think that there is no logical basis for treating the crown differently from other creditors when the debt has no special status. What the Court of Appeal held to be implicit in the law should be made explicit in the reformed legislation.

RECOMMENDATION 143:

APPLICATION TO THE CROWN

The reformed legislation should provide expressly that it applies to the Crown where the crown debt does not have priority by virtue of statute or crown prerogative.

(9) The Active Creditor

Enforcement processes are a benefit in that they produce money that can be used to satisfy judgment debts. Several burdens accompany the benefit. Creditors must wait for satisfaction of their claims while the enforcement processes operate. Enforcement processes must be paid for, and they only operate when individual creditors supply initiative and effort.

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[603] Curiously, the court found it unnecessary to decide whether the special procedures are still available to the Crown in Alberta.

[604] *Black & White, supra*, note 600 at 38. The court also found that the Crown would not have been entitled to priority in this case in any event as the debt it was claiming arose in the course of commercial as opposed to governmental activity.

The ECA successfully employs the sharing principle in the distribution of the benefit of enforcement processes among creditors. It also equalizes the wait for full satisfaction of judgment debts. The ECA does not, however, distribute the burden of individual creditor effort and initiative equitably. The burden is left to be borne mainly by the instructing creditor. It is not shared by the other creditors. The instructing creditor receives some assistance from the other creditors with respect to costs, but even that assistance is not satisfactory. The creditor whose initiative and effort has produced a fund large enough to substantially reduce the balance of the debt owed to him or her is dissatisfied when required to share with creditors who have made no effort whatsoever.

We think that this deficiency of the present system should be mitigated in reformed legislation.

(a) Costs

Can the deficiencies of the present system be remedied by adjusting the level of costs payable to the active creditor? Under the ECA, a creditor can recover a portion of the cost of enforcement proceedings from the debtor. The recoverable amount is determined by reference to Schedule C of the Rules of Court and is significantly less than the actual cost incurred. For example, the costs recoverable by an execution creditor whose solicitor files a writ of execution for $25,000, conducts an examination in aid of execution, instructs seizure of chattels, appears on an application for removal and sale, and obtains an order for sale would be $200 plus disbursements. Assuming that no extraordinary preparation was required for any of these steps, the solicitor's fee would probably be between $800 and $1000. Between $600 and $800 will be unrecoverable.

This situation exists by design. The policy is that recoverable costs should be high enough to deter frivolous defensive measures by the debtor but low enough not to discourage reasonable measures. The creditor should recover significant compensation for reasonable effort, but should bear a portion of the costs significant enough to deter reckless or foolish collection efforts.

The policy of the cost recovery system and the level of costs recoverable for enforcement steps have recently been studied and confirmed[605] and are not within the scope of this report. In any event, permitting greater recovery of costs by the initiating creditor might reduce creditors' discontent at having to share, but would do so entirely at the expense of debtors. We prefer reform that effects a sharing of the burden among creditors, not a shifting of it to the debtor.

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[605] In 1984, the amounts recoverable were increased because inflation had made recoverable costs so low as to be wholly insignificant.

Under section 11 of the ECA, the creditor whose efforts have produced the distributable fund is granted priority for costs. The distributive shares are calculated on the remaining balance. Accordingly, each creditor's share is reduced by a portion of the initiating creditor's costs, and a sharing of the burden of those costs is effected.

The act does not grant any such priority to a creditor whose execution efforts were unsuccessful, even though they were undertaken reasonably. Such costs are recovered by the creditor from the debtor as part of his or her judgment debt.

Although this treatment of an unsuccessful creditor might not always be equitable, it would be impractical to grant priority for such costs. To do so would tend to encourage reckless and wasteful enforcement efforts at the expense of the debtor. To prevent this, a mechanism for determining which costs had been incurred reasonably would be required. Such a mechanism, if it could be developed, would slow down the system, delay distributions and increase the costs.[606]

Curiously, though the unsuccessful creditor receives no priority for costs, the successful creditor receives priority not only for the costs of successful efforts but also for the costs of other unsuccessful efforts that might have been undertaken. The section grants priority for the creditor's "taxed costs subsequent to judgment". There is no justification for this inequity.

(b) Preferred payment to the active creditor

It is not part of the sharing principle that the creditors who benefit from the efforts of another creditor should receive that benefit for nothing. They have, in a way, "commissioned" one of their number to undertake enforcement efforts and should be charged accordingly.

We propose that enforcement creditors who initiate enforcement proceedings should receive special consideration in the distribution of any funds that are realized. Of course, if the distributable fund is sufficient to pay all writ holders' claims in full, there is no need for anyone to receive special consideration in the distribution. But if, as is likely, the fund is not sufficient to pay all the claims, the instructing creditor should receive a preferred payment on account of his or her claim.

The amount of the preferred payment should be large enough to provide a real acknowledgment of the instructing creditor's efforts, without being so large as to abandon or undermine the sharing principle. With this in mind, we recommend that the preferred payment to the instructing creditor be 15% of the total amount available for distribution to enforcement creditors. This figure is necessarily somewhat arbitrary, but in most situations it would meet the two criteria set out above. The amount of the preferred payment might be quite substantial, but the bulk of the fund (up to 85%) will nevertheless be distributed on a *pro rata* basis.

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[606] OLRC Part 5, *supra*, note 529 at 70.

Depending on the amount of the instructing creditor's claim in relation to the size of the fund, the preferred payment might be sufficient to pay the claim in full. If it is not, after deducting the amount of the preferred payment from the instructing creditor's original claim, the balance of the claim would be treated like any other enforcement creditor's claim in calculating the *pro rata* distribution of the remaining funds. In effect, then, there would be two payments on account of the instructing creditor's claim: a preferred payment, and a *pro rata* payment.

The preferred payment would not alter the burden on the debtor whatsoever. It would simply adjust the distribution of the proceeds of enforcement among creditors. The debtor would be liable for the same total amount.

With one important qualification, we think that the preferred payment should replace the priority for the successful creditor's costs granted by the ECA at present. All creditors would then be treated in the same manner. Their enforcement costs would be added to their individual judgments and collected through *pro rata* distributions.

At the end of this chapter we have set out three tables that illustrate the application of the "preferred share" system. It will be noted that while the "active creditor" is always substantially (and often dramatically) better off than he or she would be under the present system, other enforcement creditors are not that much worse off. The other thing to note is that the preferred payment is most beneficial to enforcement creditors whose claims are relatively small.

The one qualification that we think appropriate is that the active creditor should have priority for the taxable costs incurred in the successful collection effort. This portion of the active creditor's costs should be a first charge on the enforcement proceeds. The preferred payment should be calculated on the recovered proceeds after these disbursements have been deducted.

We do not think that this proposal will dramatically affect the level of activity of enforcement creditors. The preferred payment will not be large enough to encourage creditors to greater activity than they undertake at present. We do not think that the sheriff's offices need fear any increase in the demands placed upon them by creditors, nor do we think that the calculations required to be performed to effect a distribution would be significantly more complicated than those necessary at present.

We recognize that our proposal does not alter the position of the creditor who undertakes reasonable but unsuccessful enforcement efforts. We believe that there is no change that would eliminate this problem that would not also create a significantly greater problem by encouraging unreasonable, reckless and wasteful enforcement efforts. This, it seems to us, is an unavoidable feature of a creditor-directed judgment enforcement system.

We believe, however, that our proposal would significantly improve the existing system by effecting an equitable distribution of the burdens of the enforcement process. Technical details of the proposal, such as the identification of the "active" creditor, are worked out in the draft legislation that accompanies this report.

RECOMMENDATION 144:

PREFERRED PAYMENT TO THE ACTIVE CREDITOR

The creditor who instructs and directs an enforcement process that produces a distributable fund should receive a preferred payment of the taxable costs expended in the course of the successful enforcement process plus 15% of the proceeds of the enforcement process, after the taxable costs have been paid. The present priority for the costs of the successful creditor should be abolished. The distributive shares should be calculated after the taxable costs relating to the successful enforcement effort and the preferred payment have been deducted from the enforcement proceeds.

(10) Priorities between Enforcement Creditors

(a) Priorities in other statutes and the common law

Although priority based on the time of delivery of executions to the sheriff has been abolished by creditors relief legislation, priority based on other factors, such as the nature of the debt or the identity of the creditor, continues to exist.

Usually, such priority is granted by statute to creditors who the legislators have determined to be entitled to a prior call on their debtor's assets. Examples include:

a. the *Maintenance Enforcement Act*, which gives a spouse priority over the other creditors of the debtor spouse for recovery under a maintenance order;

b. the *Municipal Taxation Act*, which provides that a municipality that has recovered judgment for overdue taxes has priority over other execution creditors in the distribution of the proceeds of execution;

c. the *Workers' Compensation Act*, which grants priority to the Workers' Compensation Board in respect of the recovery of assessments which are overdue from an employer;

d. the Statute of Anne,[607] which provides that a landlord has first call on assets that could have been seized in distress proceedings, for up to a year's past due rent; and

e. the common law rule of crown prerogative that provides that, where the Crown and a subject are creditors of equal rank, the Crown has priority.

In each case, the grant of priority has a social policy foundation that is open to debate. It is beyond the scope of this report, however, to enter into this debate and to attempt to assess the policy behind the various grants of priority.[608]

(b) Wage earner priority

There is, however, one priority issue that is within the scope of this report. The ECA itself is the source of one grant of priority. In section 16 of the act, priority is granted to wage earner creditors over all other creditors for up to three months' wages:

> (1) All persons who
>
> (a) are employed by an execution debtor at the time of or within one month before the seizure under execution in respect of which any money is realized by the sheriff, or
>
> (b) before the expiration of the time fixed for the distribution of the money so realized, file in the

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[607] *Landlord and Tenant Act* 1709 (U.K.), 8 Anne, c. 18. See *Ogilvie Flour Mills Co.* v. *Becker* [1931] 1 W.W.R. 273 (Alta. S.C.A.D.); *Manufacturers' Life Insurance Company* v. *Bullwinkle's Gen. Stores Ltd.* (1983) 45 A.R. 51 (Q.B.M.C.); *Circa 1880 Imports Ltd.* v. *Antique Photo Parlour Ltd.* [1983] 6 W.W.R. 752 (Q.B.).

[608] It should be noted, nevertheless, that several of those who responded to our Report for Discussion, *supra*, note 4 said that a source of great frustration and dissatisfaction with the existing unsecured creditors remedies system is the priority and preference granted to the Crown and agencies of the Crown over ordinary unsecured creditors. We do not comment on the reasonableness of this dissatisfaction.

> office of the sheriff their claim for wages or salary with the particulars thereof proved by affidavit,
>
> are, subject to subsection (3), entitled to be paid out of the money so realized the amounts mentioned in subsection (2).
>
> (2) The persons referred to in subsection (1) are entitled to be paid out of the money realized,
>
> (a) the amount of wages or salary due to each of them by the execution debtor not exceeding wages or salary for 3 months, in priority to the claims of the other creditors of the execution debtor, and
>
> (b) a pro rata share with the other creditors in respect of the residue, if any, of their claims for wages and salary

This provision should not be continued in the reformed legislation. It not only grants priority to wage earner creditors but also permits them to join the ranks of those creditors entitled to share by a summary process — the filing of an affidavit.

Wage earner priority is also provided by section 100 of the *Employment Standards Code*, which provides:

> An employee shall have priority of payment to a maximum of $5000 over
>
> (a) the claims and rights of preferred, ordinary and general creditors of an employer including, without limitation, claims and rights of the Crown and agents of the Crown, and
>
> (b) any other unsecured claim or right against an employer,
>
> for wages, overtime pay and entitlements due and owing to the employee by the employer.

This act also establishes a summary procedure whereby a wage earner can make his or her claim. The process is, however, somewhat less summary than that contemplated by section 16 of the ECA. It includes procedures by which the claim is adjudicated by an officer appointed pursuant to the act. An appeal procedure is established. The officer's order can be filed in the Court of Queen's Bench where it is enforced as if it had been originally issued by that Court.

Wage claimants are likely to prefer one or other of these priority provisions, depending upon the amount of their claim and the nature of the claims with which they are in competition. The summary procedure provided by the ECA is likely to be of greater attraction to a wage earner since, in the first instance, it is much simpler. The *Employment Standards Code* procedure, however, is probably preferable from a natural justice and due process point of view.

We believe that whatever the nature of the priority granted to wage earners and whatever the procedure by which that priority is claimed, the statutory provisions in that regard should not be in the legislation that governs the distribution of judgment enforcement proceeds.

It would be more orderly if the Alberta Legislature followed only one course in granting priority to various classes of creditors. In most cases, priority provisions are contained in statutes dealing with the particular class of creditors. We suggest that this procedure be adopted in all cases.

Further, we think that it is undesirable for two statutes to deal inconsistently with the same subject. We recommend that the ECA wage claimant priority section not be continued in the reformed legislation. If the *Employment Standards Code* does not now contain all that is required to establish the priority and procedure required for wage claimants in all cases, it should be amended appropriately. The reformed enforcement legislation should contain a provision in the form of the present section 12(c) of the ECA, which requires the sheriff to honour preferences created by other statutes when making a distribution.

RECOMMENDATION 145:

WAGE EARNER PRIORITY

The wage earner priority created by the ECA should not be continued in the reformed legislation. The subject should be left entirely to the *Employment Standards Code,* which should be amended if it does not at present contain all that the Legislature wants to grant by way of special priority to wage earners. The reformed enforcement legislation should require the sheriff merely to honour the preferences and priorities established by other statutes when making a distribution.

(11) Proceeds of Enforcement Against Land

It is clear that the early creditors relief legislation was intended to apply to the proceeds of execution against land. In 1898, the following was added to *The Creditors Relief Ordinance*:

> Provided that if money is realized by sale of lands for which a certificate of title has been granted under the *Land Titles Act* 1894 the said period of two months [the grace period] shall be computed from the date of confirmation of the sheriff's sale under the said Act.[609]

The 1910 *Creditors Relief Act* was also clear on this point:

> In the distribution of money under this section creditors who have executions against goods or lands only or against goods and lands shall be entitled to share rateably with all others any moneys realized under execution against either goods or lands or against both, or under an attaching order.[610]

These provisions, however, were not carried forward into the present legislation. Moreover, the specific declaration of the sharing principle that appeared in the original creditors' relief legislation ("there shall be no priority among execution creditors"), which might have destroyed any argument that land titles priority still applied for land, was removed from the legislation in 1934.[611]

At present, the law is not clear as to whether the land titles priority principle or the sharing principle applies. Under the ECA, the requirement of sharing is linked to seizure. Section 2(a) deems all property *seized* by virtue of a writ of execution to be have been seized on behalf of all those creditors entitled to share. Section 3 authorizes the sheriff of the judicial district in which the *seizure* occurs to administer the sharing. Section 4(3)(a) requires the sheriff to *seize* property sufficient to satisfy the subsisting writs in his hands.

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[609] An Ordinance to Further Amend *The Creditors Relief Ordinance*, 1898 O.N.W.T., No. 13, s. 1.

[610] *Creditors Relief Act*, S.A. 1910, c. 4, s. 5(10).

[611] In *Black & White, supra*, note 600 the Alberta Court of Appeal noted that the abolition section is not repeated in the present legislation. They said, however, that "its omission does not revive" the common law priority system on the basis that s. 31(1) of the *Interpretation Act* provides that the repeal of an enactment (the *Creditors Relief Act*) does not revive what was in force before the repealed act.

Nothing in the process of execution sale of land, however, clearly amounts to seizure. Moreover, the wording of the present ECA ignores execution against land. Section 4(3)(a) requires the sheriff to seize sufficient "goods and chattels" to satisfy the subsisting writs.

It has been suggested that common law priority has not been abolished in the case of the distribution of the proceeds of execution sale of land.[612] Support for this proposition comes from section 1(f) of the *Land Titles Act*, which gives the writ of execution the status of an encumbrance, and section 12(c) of the ECA, which instructs the sheriff to recognize "preferences" to which creditors are entitled when making a distribution. It is argued that the land titles priority that is accorded to "encumbrances" is a preference within the meaning of section 12(c) and is therefore entitled to such recognition.

Whatever the existing law on this subject is, we believe that the sharing principle should apply to the distribution of the proceeds of an enforcement sale of land. There is no reason in principle why such proceeds should be treated any differently than the proceeds of enforcement proceedings against other property. Money in the hands of a sheriff as a result of a sheriff's sale of land looks very much like money in the hands of a sheriff as the result of a sheriff's sale of personal property.

It cannot be denied that the priority system set up by the *Land Titles Act* creates complications for the sharing system. Such complications, however, are not unique to the proceeds of an enforcement sale of land. Very similar complications will arise because of the priority rules contained in the PPSA. These complications need to be addressed, whether they arise because of the *Land Titles Act* or the PPSA. They are addressed in the next section of this chapter.

RECOMMENDATION 146:

DISTRIBUTION OF PROCEEDS OF ENFORCEMENT AGAINST LAND

The sharing principle should apply to the distribution of the proceeds of an enforcement sale of land.

(12) The Problem of Intervening Encumbrances

The sharing system must co-exist with regimes in which priority between certain encumbrances against property is determined by their order of registration on title.[613] Both the *Land Titles Act* and the PPSA create such regimes. Under either of these acts, priority between two encumbrances against certain property is generally determined by the order in which they were registered on title. In the following discussion we use the abbreviation "PDOR" (Priority Determined by Order of Registration) to refer to such priority regimes.

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[612] Funduk M.C., in *Seel Mortgage, supra*, note 547; Wetmore J., *Limoges* v. *Campbell* (1886) 2 Terr. L.R. 356 (N.W.T.S.C.).

Although superimposing a sharing system for enforcement creditors on a PDOR regime creates complications, there is no fundamental incompatibility between them. That is, no fundamental tenets of a PDOR regime are disregarded if all enforcement creditors must share in the distribution of the proceeds of enforcement proceedings, regardless of the order in which their writs may have been registered on title. The priority rules of a PDOR regime apply between interests that are assumed to be competing for priority. A PDOR regime need not be premised on the assumption that every interest in property is in a priority competition with every other interest in the same property. There is nothing that prevents a PDOR regime from grouping certain interests together and treating them as a single unit for priority purposes.[614] More specifically, there is nothing obnoxious to a PDOR regime in treating writs as having a collective priority.

We do not want to spend too much time analyzing the theoretical problem involved in this issue. We observe, however, that the suggestion of a theoretical problem largely disappears if an unnecessary assumption is abandoned. The assumption is that an enforcement creditor who registers a writ on the title to certain property must thereby obtain some kind of personal interest in the property. But an enforcement creditor who registers a writ on title need not be regarded as having any personal interest in or claim against the property in question. Instead the creditor's personal rights can be confined to a right to share in a distribution of enforcement proceeds. This right flows not from the registration of the writ on title, but from the registration of the writ in the Enforcement Registry. The only effect of registration of the writ on title is to make it more likely there will be proceeds to be distributed to enforcement creditors, by establishing a priority for the benefit of all enforcement creditors.

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[613] We use "registration" in its broad sense, so as to include, for example, the filing of a caveat or similar notification. Also, when we refer to registration "on title" we mean to include a situation, such as occurs routinely under the PPSA, in which registration of a security interest is by debtor name, rather than against specifically identified property.

[614] For example, no one would suggest that the concept of priority under a land titles system demands that, as between themselves, the respective interests of the several beneficiaries of a trust be determined by which of them registers his or her interest first. The land titles priority system is concerned with the priority issues between the beneficiaries, as a unit, and other persons who may have a competing claim against the trust property. There is no priority competition between the beneficiaries: as between themselves, their interests are determined by the trust instrument, not by any land titles priority rules. In this context, there is a reasonable analogy between trust beneficiaries and enforcement creditors under a sharing system imposed by statute.

A creature that does create some difficulty in blending a sharing system into a PDOR regime is the **intervening encumbrance**. An intervening encumbrance is an encumbrance, other than a writ, that is registered on title after some writs and before other writs. The difficulty can be illustrated by an example, in which various writs and a mortgage are registered on the title to a debtor's fully exigible land in the order indicated.

INSTRUMENT	AMOUNT
Writ 1	$10,000
Writ 2	$10,000
Mortgage	$40,000
Writ 3	$20,000
TOTAL	$80,000

Suppose that the land in question is sold, realizing net proceeds of $60,000. Since the claims against the proceeds total $80,000, there is not enough to satisfy all the claims. How is the money to be distributed?

There are two related but distinct issues involved here. The first is the extent to which writs have priority over the mortgage. The second is how the proceeds that are available for payment to enforcement creditors are to be divided between them.

(a) Priority between writs and intervening encumbrances

There are two plausible, and very different, approaches to determining priorities between writs and intervening encumbrances. We refer to them as "fixed priority" and "floating priority".

Under a fixed priority system, an encumbrance that is registered on title between two groups of writs is subordinate only to previously registered writs. More precisely, the **amount** for which it is subordinate to the writs is determined by the amount of the writs ahead of it on title. In our example, the mortgage would be subordinate to the writs up to the amount outstanding on Writ 1 and Writ 2: a total of $20,000. The mortgagee is unaffected by the subsequent registration of Writ 3. Thus, $40,000 of the $60,000 would be payable to the mortgagee, leaving only $20,000 available for distribution between the enforcement creditors.

It is generally assumed that the existing law establishes a fixed priority system.[615] It is also generally assumed that this is the proper result, because it pays due homage to the principles of PDOR.[616] We examine this latter assumption below.

Under a floating priority system, the first writ to be registered on title would establish a priority for an unlimited amount in favour of itself and all subsequently registered, or even unregistered, writs. An encumbrance registered after any writ is registered on title would be subordinate not only to that writ, but to all writs against the debtor at the time any proceeds are distributed. In our example, the mortgage would be subordinate to all three writs, which total $40,000. The writ holders would receive $40,000, and the mortgagee would receive only $20,000.

As compared with a fixed priority, a floating priority has the potential to increase the pool of funds available for distribution to enforcement creditors. In our example, fixed priority leaves the sheriff with only $20,000 to distribute to enforcement creditors, while floating priority leaves $40,000 to be paid out to enforcement creditors. Of course, the enforcement creditors' gain is the mortgagee's loss, and this is the source of objections to a floating priority system for writs.

Objections to the floating priority system are likely to proceed along the following lines. Allowing the first writ on title to establish an unlimited priority for all writs as against subsequent encumbrances defeats the purpose of a PDOR regime. A prospective lender who found one writ on title would have no means of quantifying the extent to which its security would be subordinate to the claims of enforcement creditors. The lender could safely assume only the worst: that its security might wind up being subordinate to writs whose combined amount exceeds the value of the property. In practice, this would make it impossible for a prospective lender to lend on the security of property against which any writ, however small in amount, is already registered.

There are a couple of points that can be made in reply to this objection to floating priority for writs. The first is that the objection seems to assume that a significant number of lenders are dying to lend money to enforcement debtors on the security of property that is subject to a prior writ. Even when it is fairly clear that a writ establishes priority over subsequent encumbrances only for its own amount, lenders are not anxious to lend on the security of property bound by a writ, however small its amount.[617] A lender who is prepared to lend money to an enforcement debtor on the security of such property will almost certainly insist that the loan proceeds be applied first to discharge any prior writs.

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[615] The point is not dealt with expressly in any act. Most cases in this area start from the premise that writs have a fixed priority. The only issue is how the proceeds that are available for enforcement creditors are to be divided between them.

[616] Dunlop, *supra*, note 1 at 440; J.W. Horn, annotation to *Hankin Furniture Industries Ltd. v. Gill* (1979) 14 C.P.C. 177 (B.C.S.C.). The decision in *Hankin* adopted what we have called the floating priority approach. The decision is criticized in the annotation. For a more sympathetic view of the decision, see A.C.L. Sims "The Writ of Execution and the Garnishee Summons" in *Dealings between Creditor and Debtor* (Calgary Legal Education Society of Alberta, 1982) at 21G-22G.

Giving writs a floating priority would not change things very much, if at all, for the typical lender. As will almost certainly happen now, the lender would protect its security by making sure that the loan proceeds were used first to discharge all the writs on title. Having done that, the lender would not have to be concerned that its security would be adversely affected by later writs.

The second point that can be made in reply to the objection to a floating priority system is that it would simply do for writs what the *PPSA and the Land Titles Act* already do for certain secured lenders. Both of these acts contain provisions that allow a lender to obtain priority for future advances under a mortgage or other security agreement.[618] Even if there is an upper limit to the amount secured, this limit can greatly exceed the value of the property in question. From the perspective of a subsequent lender, there is no practical limit to the priority of the earlier encumbrance. Thus, the practical problems posed to prospective lenders by a writ that establishes priority for an indefinite amount are not much different than the problems posed by a prior security instrument that secures future advances.

We do not think that the practices and problems of secured lenders would be much different under a floating priority system for writs than they would be under a fixed priority system. In either case, very few lenders would be prepared to advance money on the security of property that is already bound by a writ, unless the writ is first discharged.[619] From a lender's perspective, what is probably most important is that the priority position be clear, and that there be a satisfactory mechanism for ensuring that any writs on title can be discharged before or at the time that funds are advanced by a lender. If these two criteria are met, prospective lenders will be able to protect themselves, whether writs have a floating or a fixed priority.

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[617] Some lenders routinely lend money on the security of second mortgages, where there is sufficient equity in the property. Why would such a lender not be prepared to lend on the security of a mortgage that would be subordinate to a writ for a small amount, rather than to a first mortgage? Probably because a better analogy is to a first mortgage that is in default, and under which foreclosure proceedings have been commenced. We suspect that even the boldest of lenders would pause before lending money on the security of a second mortgage where foreclosure proceedings have already been commenced on the first mortgage.

[618] *Land Titles Act*, s. 106.1; PPSA, ss 14, 35(4).

[619] We say nothing about the degree of enthusiasm with which most lenders would regard the prospect of lending money to an enforcement debtor, priority problems aside.

To summarize, the main objection to a floating priority system is that it would be unfair to the intervening encumbrancer. We disagree. If it would have any substantial effect on prospective lenders, it would be to discourage them from making loans on the security of property that is bound by a writ. This would make it more difficult for enforcement debtors to deal with their property without first attending to the claims of their creditors. We do not think that this is necessarily a bad thing.

We have gone to some length to show that a floating priority for writs would not contradict any of the fundamental requirements of a PDOR regime. Indeed, it would be unlikely to have any substantial effect on the existing practices of lenders. Nevertheless, we stop short of recommending the adoption of floating priority for writs.

The existing law in this and other jurisdictions with sharing systems gives writs a fixed priority. So far as we are aware, there has been no outcry from unsecured creditors or their representatives in favour of a floating priority system. This is probably because enforcement creditors are not plagued by the problem of intervening encumbrances. As we have pointed out above, lenders are generally far from anxious to lend money on security that is subordinate to a writ, even a small writ that has a fixed priority. Thus, we are not convinced that there is a substantial practical problem that a floating priority system would address.

(b) Distribution between enforcement creditors

The discussion that follows assumes that priority between writs and intervening encumbrances is determined according to the fixed priority method. In our example, net proceeds of $60,000 were realized through the sale of fully exigible land that was subject to the following encumbrances.

INSTRUMENT	AMOUNT
Writ 1	$10,000
Writ 2	$10,000
Mortgage	$40,000
Writ 3	$20,000
TOTAL	$80,000

Under the fixed priority principle, the mortgagee would receive $40,000, leaving $20,000 to be divided between the three enforcement creditors, whose writs total $40,000. How should this sum be divided?

The sharing principle suggests that the money should be divided between all three enforcement creditors, notwithstanding that only Writ 1 and Writ 2 had priority over the mortgage. Alberta cases, however, have divided the writs into different tiers, according to whether they did or did not have priority over the intervening writ.[620] In a distribution of the funds available for payment to enforcement creditors, the writs that were ahead of the intervening encumbrance are given priority over other writs. In our example, the $20,000 would be divided between the holders of Writ 1 and Writ 2; the holder of Writ 3 would get nothing.

Although the Alberta cases have adopted a "tier" approach, they have done so on the basis of analyses of the relevant statutes.[621] They have not said that this is necessarily the best approach, and have not advanced policy reasons for not applying the sharing principle where the problem of intervening encumbrances arises. At the same time, commentators have criticized the "tier" approach on policy grounds, arguing that the presence of an intervening encumbrance should not oust the sharing principle:

> This result [allowing all writs to share] ignores the common law priority position of [earlier writs] vis-a-vis [later writs] but that after all is the fundamental purpose of creditors' relief legislation.[622]

We agree, and recommend that the sharing principle should be applied with its full force even where there is an intervening encumbrance between writs.

(c) Exemptions and intervening encumbrances

A complication can be created by the interplay of the rules regarding exemptions, priorities and distribution. The complication can arise where property that is "partially exempt" is subject to writs and an intervening encumbrance, such as a mortgage.

Suppose that an enforcement debtor has clear title to an urban home worth approximately $100,000. A writ for $30,000 is recorded on title, following which a mortgage for $30,000 is registered.[623] Then another writ for $40,000 is recorded on title. Finally, the home is sold by the sheriff, realizing net proceeds of $100,000. Under the fixed priority system, the mortgagee should receive $30,000; the mortgagee is not affected by exemptions, and the mortgage is subordinate to the writs only to the extent of $30,000. Since the proceeds total $100,000, the mortgagee can be paid in full.[624] Thus, we assume that the mortgagee receives $30,000, leaving $70,000 in the hands of the sheriff. What happens to this $70,000?

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[620] *Edmonton Mortgage Co. v. Gross* (1911), 18 W.L.R. 385 (S.C.T.D.); *Seel Mortgage, supra,* note 547; *First City Trust Company v. Stan Horvat Construction Ltd.* (1981) 32 A.R. 537 (Q.B.M.C.). Actually, these cases determine only that writs ahead of the intervening encumbrance (here, Writ 1 and Writ 2) do not have to share with writs behind the encumbrance. What if the amount available for payment to enforcement creditors was less than the total amount outstanding on Writ 1 and Writ 2. Would they share ratably, or would Writ 1 have priority over Writ 2, on the basis of the former's earlier registration against title? The Alberta courts have never had to decide this issue, although it has sometimes been discussed: see *Seel Mortgage, supra note 547* at 313-17.

[621] The relevant statutes are the *Seizures Act*, the ECA, and the *Land Titles Act*: see *Seel Mortgage, ibid.* at 301-05.

[622] Dunlop, *supra,* note 1 at 440.

One possibility is for the enforcement debtor to be paid $40,000 — the amount of the urban home exemption — leaving the writ holders to share the remaining $30,000. At first glance, this seems to be a proper outcome. The mortgagee gets paid in full, the enforcement debtor gets the amount of the exemption, and the enforcement creditors get the amount — $30,000 — for which their writs collectively had priority over the mortgage.

We do not, however, regard the foregoing as the appropriate result, as between enforcement creditors and the enforcement debtor. If a mortgage had not been granted after the first writ was recorded on title, and the property had been sold by the sheriff, the enforcement debtor would have received $40,000, and the two creditors would have received $60,000 between them. Presumably, though, the enforcement debtor received $30,000 from the mortgagee when the mortgage was granted. Thus, by the time the land is sold in the enforcement proceedings, the debtor has already received $30,000 of the $40,000 "shelter allowance" contemplated by the exemptions policy. Therefore, the money paid by the sheriff to the mortgagee should be charged against the debtor's exemption. By mortgaging the property while it is bound by a writ, the debtor has, in effect, mortgaged the exemption.

The $70,000 still in the sheriff's hands after the payment of $30,000 to the mortgagee would be dealt with as follows. $10,000 would be paid to the debtor.[625] This $10,000 payment, together with the $30,000 paid by the sheriff to the mortgagee, exhausts the exemption. This leaves $60,000 to be paid to the writ holders.

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[623] For the reasons described earlier, this is an improbable scenario: most lenders would not accept security that is subordinate to a writ.

[624] Indeed, on these facts the mortgage could be paid in full even if it were subordinate to both writs, since they total $70,000 and the net proceeds are $100,000.

[625] We speak of $30,000 being paid to the mortgagee and $10,000 to the debtor. That would be the ultimate result. Mechanically, however, we think that it usually would be appropriate for the sheriff to pay into court the surplus remaining after payment of the writ. It may be unclear how much is outstanding on the mortgage, or there may be some other unresolved issue as between the mortgagee and the debtor. Therefore, unless the relevant parties otherwise agree, we think the sheriff should pay any proceeds of enforcement to which enforcement creditors are not entitled into court, whenever someone other than the debtor might have

RECOMMENDATION 147:

INTERVENING ENCUMBRANCES

An intervening encumbrance on property that is sold in enforcement proceedings should be subordinate only to those writs that were on title before the encumbrance was registered.

As between enforcement creditors, the sharing principle should apply notwithstanding the presence of an intervening encumbrance.

Where "partially exempt" property that is subject to an intervening encumbrance is sold, the amount otherwise payable to the enforcement debtor as exempt proceeds should be reduced by the amount paid out of the proceeds on the intervening encumbrance.

(13) Off-title Writs

Under the present law, it appears that a creditor who has filed a writ at the sheriff's office, but who has not registered the writ at the Land Titles Office at the time a sheriff agrees to sell the debtor's land, is not entitled to any share of the proceeds of sale.[626] The reason advanced for this result is that such a debtor's writ did not bind the land when it was sold, so the debtor has no claim against the proceeds of sale. Under our proposed system, this reasoning would apply as well to personal property that was not bound by a certain debtor's writ at the time the property was sold.[627]

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a claim against the surplus.

[626] *Thompson v. Berglund* (1910-11), 16 W.L.R. 154, Sask. L.R. 470 (Sask. S.C.); *Beaver Lumber v. Quebec Bank* [1918] 2 W.W.R. 1052. See *Seel Mortgage*, *supra*, note 547.

[627] This result could occur if the writ had not been registered in the PPR, or if the property in question was a car against which the writ had not been registered by serial number. In either case, the writ would not bind that property.

We see no theoretical or practical difficulty in including off-title writs in the distribution of enforcement proceeds of land or personal property. Regarding the argument that an off-title writ did not bind the property before it was sold, and thus has no claim against the proceeds, we would repeat an observation we made earlier in a slightly different context. The conceptual difficulty disappears if an enforcement creditor is regarded not as having personal rights against property that is bound by his or her writ, but as having a right to participate in the distribution of enforcement proceeds that come into the hands of a sheriff.[628]

Holders of on-title writs might not be terribly excited about sharing with off-title writ holders, when this reduces the amount they would otherwise get on a distribution. This, however, is a consequence of the sharing principle. Having accepted this principle, we see no compelling reason for not applying it in this particular situation.

Of course, it will be in the interest of all enforcement creditors if it is as easy as possible for writs to be registered against the title of a debtor's land. Ideally, registration of a writ in the Enforcement Registry would automatically result in a corresponding registration against land registered in the debtor's name in the Land Titles Office. This may be possible in the not too distant future, by linking the records of the Enforcement Registry with those of the Land Titles Office. In the meantime, we propose that whenever a writ is registered against the title to a debtor's land, that fact, along with a legal description of the land, should be recorded in the Enforcement Registry. This will make it easier for other to identify and register their writs against the land.

RECOMMENDATION 148:

OFF-TITLE WRITS

In the distribution of enforcement proceeds, no distinction should be made between writs that bound the property that is the source of the proceeds and writs that did not.

Registration of writs against the title to debtors' land should be made as easy as possible, if not an automatic consequence of registration of the writ in the Enforcement Registry.

Until automatic registration is possible, the fact that a writ has been registered against the title to a debtor's land, along with a legal description of the land, should

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[628] This point is made in a little more detail, *supra*, at 360.

be recorded in the Enforcement Registry, for the information of other enforcement creditors.

(14) Surplus Resulting from Enforcement of a Security Interest or other Encumbrance

Property of enforcement debtors is often subject to a security interest or encumbrance that has priority over any writs against the property. If the secured party enforces the security, and a surplus remains after payment of the secured obligation, a question arises as to the disposition of the surplus. Must it be turned over to the sheriff (assuming that it is not already in the hands of the sheriff) to be dealt with in the same manner as proceeds of property sold under a writ, or should it be dealt with in some other way? Under the present law, the answer might depend on whether the property whose sale produced the surplus is land or personal property.

In *Province of Alberta Treasury Branches* v. *Floral Holdings Ltd. et al.*[629] Mason J. held that the ECA does not apply to the distribution of a mortgage foreclosure surplus to execution creditors who had writs registered against the foreclosed title. The decision is founded on an interpretation of the existing legislation. It does not purport to be based on policy. Mason J. said:

> Whether the policy behind the E.C.A. should extend to the proceeds of the sale of land, whether under mortgage foreclosure or execution, is a decision to be made and clearly expressed by the legislature of this province.[630]

Where the surplus results from the enforcement of a security interest in personal property, the existing law is far from clear. Before the enactment of the PPSA, section 46 of the *Seizures Act* provided a clear indication of what should happen to a surplus resulting from a "distress sale". This section provides:

> (1) The *Execution Creditors Act* is not applicable to the proceeds of sale of any property seized and sold otherwise than under a writ of execution.
>
> (2) Notwithstanding subsection (1), when a chattel has been seized and sold in the exercise of a power of distress to which this Act applies, any surplus money remaining in the hands of the sheriff after he has

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[629] *Supra*, note 547.

[630] *Ibid*. at 12.

> (a) paid in full the claim of the person who exercised the power of distress, and
>
> (b) deducted his fees, charges and expenses and any claims for damages in respect of the distress and levy,
>
> shall be deemed to be the proceeds of property seized and sold under a writ of execution and to have been attached on behalf of all creditors who are entitled by the *Execution Creditors Act* to share in any money received by the sheriff by reason of a seizure or attachment.

This section would have applied, for instance, to a surplus resulting from seizure and sale under a chattel mortgage or a conditional sales contract.

Section 46 was not changed by the PPSA, but its application was. Section 2(a) of the *Seizures Act* now provides that the act does not apply to a security agreement to which the PPSA applies except as provided by the *Seizures Act* or the PPSA. There is no express mention of section 46 in the PPSA, so it would be difficult to argue that section 46(2) would apply to a surplus remaining upon the sale of collateral by or on behalf of a secured creditor under the PPSA.[631] Section 61 of the PPSA does deal with the disposition of such a surplus, but it does not do so in a way that sheds light on the issue at hand. One may speculate that this is not an issue to which the drafters of the PPSA addressed their minds.

What should the law on this point be? Should the surplus resulting from the enforcement of a security interest, whether in land or personal property, be subject to the sharing principle?

It might be helpful to recall our previous discussion of the line between those kinds of payments to creditors that should be shared and those that should not. In that discussion, we concluded that direct payments to creditors, including voluntary payments by the debtor after the writ of enforcement has been issued, should not be shared. We could see no merit in distinguishing such payments from voluntary payments made to the creditor before action, judgment or writ of enforcement. Similarly, we can see no distinction between direct payments to a creditor who has issued a writ of enforcement and to a creditor who has gone the further step of registering the writ of enforcement on the title to the debtor's land.

We believe, however, that the line between funds that should and funds that should not be shared is crossed when the distribution of the surplus funds generated by the enforcement of a security interest is considered. The reasons we gave for excluding the application of the sharing principle to voluntary payments do not apply to the surplus proceeds of the enforcement of a security interest, whether in land or personal property. Applying the sharing principle to such surpluses would not discourage enforcement debtors from making voluntary payments to creditors; there is no obvious connection between a voluntary payment from an enforcement debtor to one of several enforcement creditors, and a surplus resulting from the enforcement of a security interest.

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[631] Even under the pre-PPSA regime, the application of s. 46(2) would have been somewhat spotty. It would not have applied to a surplus resulting from a the enforcement of a corporate debenture.

In our view, the crucial difference between a voluntary payment and a surplus resulting from the enforcement of a security interest is a practical one. We observed that it would be extremely difficult to enforce a rule that would, in effect, outlaw direct payments from enforcement debtors to enforcement creditors. By comparison, it would be relatively easy to police a requirement that the surplus proceeds of the enforcement of a security interest be brought into the distribution system. In many cases, this surplus will already be sitting in court or, even more conveniently, in the sheriff's office. Even if the enforcement of the security interest was undertaken without direct court supervision, it is a simple matter to require the person who has possession of the surplus (most likely, a receiver appointed by a secured party under the PPSA) to pay the surplus to the sheriff. The sheriff would then be able to distribute the surplus in accordance with the sharing principle. We so recommend.

There is, however, the matter of exemptions to be considered. If the property from which the surplus is derived was wholly exempt from enforcement, the surplus should be paid by the sheriff to the enforcement debtor. If the property was exempt up to a certain limit, the exempt portion of the surplus should be paid to the enforcement debtor, just as it would have been if the property had been sold in enforcement proceedings under a writ.

RECOMMENDATION 149:

DISTRIBUTION OF SURPLUS RESULTING FROM ENFORCEMENT OF PRIOR SECURITY INTEREST OR ENCUMBRANCE

A surplus resulting from the enforcement of a security interest in any property bound by a writ should be paid to (or retained by) the sheriff, who should then distribute the funds in the same manner as funds realized through enforcement proceedings, taking into account any exemptions to which the enforcement debtor is entitled.

EXAMPLES OF OPERATION OF PROPOSED PREFERRED PAYMENT FOR ACTIVE CREDITOR

(See page 354)

ASSUMPTIONS:	WRIT A	5,000.00
	WRIT B	10,000.00
	WRIT C	10,000.00
	WRIT D	20,000.00
	WRIT E	30,000.00
	TOTAL WRITS	75,000.00

ACTIVE CREDITOR'S PREFERRED PAYMENT: 15% of Amount Collected

EXAMPLE #1

Amount available for distribution, after payment of costs: $ 5,000

AMOUNT PAYABLE WHERE
ACTIVE CREDITOR IS:

	ECA SHARE	A	B	C	D	E
WRIT A	333.33	1,033.33	283.33	283.33	283.33	283.33
WRIT B	666.67	566.67	1,316.67	566.67	566.67	566.67
WRIT C	666.67	566.67	566.67	1,316.67	566.67	566.67
WRIT D	1,333.33	1,133.33	1,133.33	1,133.33	1,883.33	1,133.33
WRIT E	2,000.00	1,700.00	1,700.00	1,700.00	1,700.00	2,450.00
TOTALS:	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00

EXAMPLE #2

Amount available for distribution, after payment of costs: $25,000

AMOUNT PAYABLE WHERE
ACTIVE CREDITOR IS:

	ECA SHARE	A	B	C	D	E
WRIT A	1,666.67	5,000.00	1,416.67	1,416.67	1,416.67	1,416.67
WRIT B	3,333.33	2,857.14	6,583.33	2,833.33	2,833.33	2,833.33
WRIT C	3,333.33	2,857.14	2,833.33	6,583.33	2,833.33	2,833.33
WRIT D	6,666.67	5,714.29	5,666.67	5,666.67	9,416.67	5,666.67
WRIT E	10,000.00	8,571.43	8,500.00	8,500.00	8,500.00	12,250.00
TOTALS:	25,000.00	25,000.00	25,000.00	25,000.00	25,000.00	25,000.00

EXAMPLE #3

Amount available for distribution, after payment of costs: $55,000

AMOUNT PAYABLE WHERE
ACTIVE CREDITOR IS:

	ECA SHARE	A	B	C	D	E
WRIT A	3,666.67	5,000.00	3,461.54	3,461.54	3,181.82	3,116.67
WRIT B	7,333.33	7,142.86	10,000.00	6,923.08	6,363.64	6,233.33
WRIT C	7,333.33	7,142.86	6,923.08	10,000.00	6,363.64	6,233.33
WRIT D	14,666.67	14,285.71	13,846.15	13,846.15	20,000.00	12,466.67
WRIT E	22,000.00	21,428.57	20,769.23	20,769.23	19,090.91	26,950.00
TOTALS:	55,000.00	55,000.00	55,000.00	55,000.00	55,000.00	55,000.00

CHAPTER 11
COMPENSATION FOR LOSS

The nature of the enforcement process makes it inevitable that occasionally innocent persons will suffer unintended injury in the course of enforcement proceedings. This is especially so where seizure and sale of personal property is concerned. In the course of an ordinary seizure, a sheriff's officer might have to try to answer, on the basis of little — and perhaps conflicting — evidence, questions such as: Does this property belong to the debtor or someone else? Is this exempt property? For how much could this property be sold? Is it necessary to remove this property for safe keeping? It would take an omniscience that a sheriff's officer (or anyone else) cannot be expected to possess to always come up with the correct answers to these questions. A decision based on an incorrect answer can easily cause substantial financial injury to the enforcement debtor, an enforcement creditor or a third person.

Given the probability, indeed the inevitability, of financial injuries resulting from the enforcement process, it is necessary to consider the problem of compensation for the victims of such injury. This resolves itself into two main issues. First, there is the issue of in what circumstances a person who suffers a loss as a result of a "mishap" in the enforcement process should be compensated. Second, there is the question of from where this compensation should come. Who — or what — should be liable to pay the compensation?

A. The Potential for Loss

(1) Third Persons

The most likely cause of injury to third persons is the seizure and perhaps the sale, of their property in the mistaken belief that it belongs to the debtor. In itself, seizure of a third person's property is not likely to cause substantial loss or injury, especially where the seized property is left on a bailee's undertaking; however, the potential for substantial loss is there. If the seized property is removed for safe keeping, the third party will be deprived of its use. Even if the property is not removed, that it is under seizure could, for example, deprive the third person of an opportunity to sell it for a favourable price.

The sale of a third person's property by the sheriff does not usually affect the former's legal right to recover the property. A sheriff's sale generally conveys only the debtor's actual interest in the property; the rights of any other person in or against the property survive the sale. Thus, in theory at least, the true owner is not in any worse position after the sheriff's sale than before. As a practical matter, though, the true owner is likely to be in a worse position after the sale than while the property is simply under seizure. The purchaser of the property might be impossible to find, and even if found might not relinquish the property without a fight.

The preceding paragraph suggests that there is another kind of third person who is likely to suffer an injury as a result of a mishap in the enforcement process. This is the person who buys property at a sheriff's sale that turns out not to have belonged to the debtor. If the true owner chooses to pursue the third party, the latter will have no defence to an action by the former to recover the property itself, or to recover damages for conversion. Nor will the purchaser have a claim against the sheriff, since the sheriff selling property in execution does not give any warranty of title.[632]

(2) Debtors

Successful enforcement proceedings will necessarily cause a kind of pecuniary injury to the debtor: the very object of the proceedings is to convert property of the debtor into money and to pay that money to enforcement creditors. The creditor's gain is the debtor's loss. Obviously, the debtor cannot expect to be compensated for this sort of injury. But it is possible for the debtor to suffer financial injury that is not simply the natural and intended outcome of enforcement proceedings. Such injuries could be the result of an excessive seizure, seizure of exempt property, sale of properly seized property at a substantial undervalue, or damage to property of the debtor that is not itself seized in the course of a seizure of other property.

As is the case for third persons, substantial damage is more likely to be occasioned by a sale of, say, exempt property than by its mere seizure. A debtor with whom seized property is left on a bailee's undertaking might, in fact, suffer no substantial damage whatsoever as a result of the seizure. It is possible, nevertheless, for a debtor to suffer substantial injury from a "wrongful" seizure, even if the property is not actually sold. This is especially so where the seized property is removed, thus depriving the debtor of its use.

(3) Creditors

The kind of injury that can be suffered by enforcement creditors because of a mishap in the enforcement process is different than the sort of injury likely to be suffered by a debtor or third person. In the latter case, the injury is likely to consist of the enforcement process wrongfully depriving the debtor or third person of some item of property. In the former case, the injury consists of the failure of the process to do for the creditor what it is supposed to do. What the enforcement system is supposed to do for creditors is to liquidate the non-exempt property of the debtor and to pay the money thereby realized to creditors in accordance with the distribution rules.

Of course, that one or more enforcement creditors of a debtor have not been paid in full after the enforcement process has run its course does not mean that such a creditor has necessarily been "injured" by the process. A creditor has no grounds for complaint if the process has done as much as reasonably possible, given the value of the debtor's exigible assets, to satisfy the claims of creditors.

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[632] We discuss the plight of the purchaser at a sheriff's sale in more detail, *supra*, at 108. We recommend that purchasers who do not get the title they expect at a sheriff's sale be compensated.

An enforcement creditor will only have grounds for complaint if the system fails to achieve the results that it could reasonably have been expected to achieve. For example, exigible property might have disappeared because the sheriff's office has failed to act expeditiously to effect seizure after being instructed to do so; or the sheriff's office might have failed to seize sufficient exigible property to satisfy all existing writs when it had the opportunity to do so; or seized property might have been sold at a substantial undervalue, resulting in less money being available for distribution to enforcement creditors.[633]

B. Potential Liability of Various Participants in the Enforcement Process

We do not propose to exhaustively analyze the current law regarding the potential liability of various participants in the enforcement process for injuries incurred through that process. This should be regarded as nothing more than a summary, and an incomplete summary at that. Its purpose is simply to provide a background for our reform proposals.

We shall begin by briefly outlining the main theories of liability that might be applicable where someone suffers an injury as a result of a mishap in the enforcement process. We then summarize how these theories of liability might apply to various participants in the enforcement process.

(1) Theories of Liability

(a) Actions founded on trespass or conversion

A person who interferes with the goods of another without legal justification[634] commits the tort of trespass to goods. Any dealing with goods in a manner inconsistent with the owner's rights, and done with the intention of denying the owner's rights or asserting an inconsistent right, amounts to the tort of conversion.[635] The main practical difference between the two torts — trespass and conversion — is in the manner of calculating damages. For a mere trespass, the measure of the plaintiff's recovery is the actual damage proved to have been suffered. But a defendant who is found to have converted the plaintiff's goods is liable to pay their full value.

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[633] It will be noted that this particular mishap is also mentioned in our discussion of injuries that can be suffered by debtors. An undervalue sale of seized property might well adversely affect both the enforcement debtor and enforcement creditors. The latter will be paid less than they might have been; the former's liabilities will be reduced by less than they might have been.

[634] For simplicity's sake, we ignore the distinction between actions based on a right to possession and actions based on a right of property. Strictly speaking, both trespass and conversion are torts committed against a person with possession or a right to possession of the goods, who might or might not be the owner of the goods. But it does no real harm to refer to the person who has a cause of action as the "true owner".

Seizure of goods involves an interference that ordinarily would amount to trespass,[636] and the sale of a person's goods without his or her authority generally constitutes conversion. But a sheriff who seizes and sells exigible goods of a debtor does so under the authority of a writ of execution and acts therefore with legal justification.

A writ, however, only authorizes the sheriff to seize sufficient exigible property of the debtor to satisfy the writs against the debtor. It does not authorize the sheriff to seize exempt[637] property. It does not authorize the seizure of more property than is necessary to satisfy the writs against the debtor. It certainly does not authorize the sheriff to seize property that does not belong to the debtor. The seizure of exempt property,[638] of more property than is necessary to satisfy the writs,[639] or of the property of a third person[640] would amount therefore to trespass. The sale of such property would amount to conversion.[641]

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[635] 33 C.E.D. Western, Title 142, Trespass, § 67.

[636] Apparently, this is so, even if the sheriff's bailiff does not actually lay hands on the seized goods, and leaves them with the debtor on a bailee's undertaking: *Demers v. Desrosier* (No. 2) [1929] W.W.R. 241 (Alta. S.C.T.D.), at 245. The theory is that the sheriff has taken constructive possession of the seized goods.

[637] Subject to s. 45 of the *Seizures Act*, which permits a temporary seizure of exempt property that cannot be readily distinguished from exigible property.

[638] Subject to the exception set out in the preceding footnote.

[639] Of course, a sheriff's bailiff cannot be expected to calculate the value of the seized property precisely in relation to the amount of the writs and seize only enough property to satisfy the writs exactly. A seizure will be tortious only if it is "obviously excessive": *Moore v. Lambeth County Court Registrar* (No. 2) [1970] 1 All E.R. 980 (C.A.), at 984 and 986. Even if the seizure itself is not obviously excessive, sale of more of the debtor's goods than is necessary to satisfy the outstanding writs may constitute conversion: *Overn v. Strand* [1931] S.C.R. 720, at 733.

[640] See, for example, *Overn v. Strand*, *ibid.*; *384238 Ontario Ltd. v. The Queen* (1983) 8 D.L.R. (4th) 676 (F.C.A.).

[641] The line between trespass and conversion can be rather fuzzy. It might be possible to treat seizure of a third person's property as being in itself

(continued...)

An action for trespass or conversion arising out of a seizure does not require that the sheriff (or anyone else) be shown to have acted negligently. Clearly, the sheriff's bailiff who effects the seizure or sells the goods will have intentionally seized or sold the goods in question. That is enough to found liability in trespass, unless his action is actually authorized by the writ. That the bailiff might have reasonably (but mistakenly) believed that the goods were the debtor's is no defence to an action for trespass or conversion,[642] unless the owner is estopped by his or her own conduct from complaining.[643]

Our final point concerning trespass is that this action can probably be maintained without proof of actual damage.[644] Even if actual damage must be shown, it would seem that the slightest inconvenience will constitute "actual damage". In *Demers v. Desrosier*, where the seized property had been left with the plaintiff on a bailee's undertaking, he was held to have suffered some damage because he had been "dispossessed of the chattels notwithstanding that they were never actually out of his custody."[645]

(b) Actions founded on negligence

Negligence causing actual damage to the plaintiff is the essential ingredient of a cause of action for most other mishaps that might occur in the enforcement process. Where a sheriff's officer negligently sells seized property for a price that is plainly inadequate in relation to its value, a party who suffers loss because of this improvident disposition will have a cause of action.[646] Or if a sheriff's

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[641](...continued)
conversion. But the courts would undoubtedly be reluctant to treat mere seizure, as opposed to sale, of a third person's property as anything more than trespass, see *384238 Ontario Ltd. v. The Queen*, *id*. at 683-85.

[642] *384238 Ontario Ltd. v. The Queen*, *ibid*. at 687-88. Stone J. appears to suggest that cases involving seizure may proceed on a different principle than ordinary cases of trespass to goods, where negligence must be shown. The cases referred to do not support that proposition. What they say is that interference with goods is actionable only if the interference is *intentional* or negligent. The interference involved in a seizure is surely intentional in the relevant sense.

[643] *Ibid*. at 688-90.

[644] This is a matter of some controversy: see *Demers v. Desrosier*, *supra*, note 636 at 244.

[645] *Ibid*. at 245.

[646] See, for example, *De Zouche v. Cook* [1920] 2 W.W.R. 268 (Sask. K.B.); *T.J. Fair & Co. v. Wardstrom* [1919] 2 W.W.R. 555 (Alta. S.C.A.D.). In the
(continued...)

officer loses an opportunity to seize exigible property of the debtor because of unreasonable delay in attempting to effect seizure, an aggrieved enforcement creditor will have a cause of action in negligence.[647] The measure of the creditor's recovery will be the amount that he or she probably would have received if the sheriff had acted with proper diligence.[648]

We have briefly described the main theories of liability upon which a person — debtor, creditor or third person — might seek compensation for loss suffered in the course of enforcement proceedings. We have said that, in certain circumstances, a person who suffers loss will have a cause of action for trespass, conversion or negligence.[649] We have deliberately ignored, however, the question of against whom the injured person will have a cause of action. The identity of the party who is liable might well be crucial to the injured person's prospects of actually being compensated. We now examine the potential liability of various participants in the enforcement process.

(2) The Crown

The various persons who actually carry out the functions of "the sheriff" are employees of the provincial government. It would be natural to assume that in keeping with normal tort principles, the Crown is liable for torts committed by such persons in the course of enforcement proceedings; however, this is not the case. At common law, the Crown was not liable for wrongs committed by sheriffs or sheriffs' officers in the execution of writs. Section 5 of the *Proceedings Against the Crown Act*, which generally makes the Crown liable for torts committed by its officers or servants, contains the following exception:

> (6) No proceedings lie against the Crown under this section in respect of any thing done or omitted to be done by any person while discharging or purporting to discharge responsibilities . . . that he has in connection with the execution of judicial process.

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[646](...continued)
former case, the aggrieved party was the enforcement debtor whose goods were sold; in the latter two cases, the plaintiffs were enforcement creditors.

[647] *Great Northern Insurance Co. v. Young* [1917] 1 W.W.R. 886 (Alta. S.C.T.D.), although see text at note 657, *infra*; *Massey Manufacturing Co. v. Clement* (1893) 9 Man. R. 359; *Brown v. Jarvis* (1836) 150 E.R. 617.

[648] *Massey Manufacturing Co. v. Clement*, *ibid.*

[649] We do not mean to leave the impression that these are the only possible bases of liability, just that they are the most likely to arise in practice.

Thus, a person injured by something done (or not done when it should have been done) by the sheriff's office must look elsewhere than to the Crown for compensation.

(3) The Sheriff

It is necessary to keep in mind that in discussing the possible liability of the sheriff, we are discussing the liability of an individual: the person who happens to bear the title of "sheriff" for a particular judicial district. There is no incorporeal legal entity called "the sheriff" that can be made liable for a judgment.

The complex set of rules developed by the English common law regarding the liability of a sheriff for the acts of his officers and bailiffs was based on the theory that the sheriff was personally responsible for carrying out all the duties of his office. Necessity required that he be permitted to delegate these duties to the under-sheriff and to his bailiffs. But having so delegated his duties, the sheriff remained responsible for their performance to the same extent as he would have been if he had performed them personally. Thus, in general, the sheriff was liable for any tort committed by his men in the purported execution of a writ.

Whatever one might say about its theoretical underpinnings, the English common law rule regarding the sheriff's liability was quite practical. A person who was injured by something done on behalf of the sheriff could simply sue the sheriff. This simplified the task of deciding whom to sue. It also gave the plaintiff a claim against a person who would likely be able to satisfy a judgment.[650] It should not be thought that the sheriff was ultimately left to bear the financial burden of mishaps for which he was in no way morally responsible. The sheriff was expected to protect himself by obtaining an indemnity, with appropriate security, from the under-sheriff and bailiffs.[651] Thus, imposing liability on the sheriff made it easier for persons who suffered wrongs at the hands of the sheriff's men to recover compensation, without imposing an unfair financial responsibility on the sheriff.

The English common law rule regarding the liability of the sheriff for his subordinate's acts did not survive long in this province. Our courts considered that the office of the sheriff in this province was so different from that of the English sheriff that it would be unfair to make the person bearing the title "sheriff" responsible for all those persons who actually did the sheriff's work. The particular difference fastened upon in the leading case, *Great Northern Insurance*

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[650] It was provided by statute that "no man shall be sheriff . . . except he have sufficient lands . . . whereof to answer the king and his people, in case that any person shall complain against him", quoted in R.C. Sewell, *A Treatise on the Law of the Sheriff* (London: Butterworths, 1842), at 17.

[651] Sewell, *ibid*. at 35, 41.

v. Young[652] was that the Alberta sheriff, unlike his English counterpart, exercises no formal control over the appointment of his subordinates. They, like he, are appointed by and are employees of the provincial government. It would be unjust, so the reasoning goes, to make the sheriff liable for torts committed by subordinates not of his own choosing.[653]

Thus, in Alberta, the person who bears the title of "sheriff" is not responsible for wrongs committed by his or her subordinates. This applies whether the plaintiff is an execution creditor,[654] an execution debtor, or a third person whose property has been improperly seized or sold in execution.[655]

(4) Sheriff's Officers

A sheriff's bailiff who commits a trespass or who is guilty of conversion is liable to the injured party. Under the English common law, the injured party would not be terribly concerned with his or her theoretical cause of action against the bailiff because the sheriff was also liable, and would be more likely to be able to satisfy a judgment. But in Alberta, as we have seen, the sheriff does not incur vicarious liability for the acts of a bailiff. So here the liability of the bailiff is of more than mere academic interest to the injured party.

Will a bailiff be liable if his neglect of duty causes financial injury to a creditor, as in *Great Northern Insurance Co. v. Young*?[656] There the bailiff's failure to act on seizure instructions within a reasonable time caused an execution creditor to suffer a loss. As we have seen, the sheriff was held not responsible for the bailiff's default. Walsh J. suggested in an *obiter dictum* that the bailiff himself would have been liable to the creditor if he had been named as a defendant. As logical as that sounds, it is not indisputable. According to older authorities, it is the sheriff, not the sheriff's bailiff, who owes a duty to the creditor to carry out seizure instructions. Thus, a bailiff who failed to effect seizure expeditiously would not be directly liable to the creditor.[657] If followed, Walsh J.'s dictum would impose a liability on bailiffs to which they were not subject on the older authorities.

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[652] *Supra*, note 647.

[653] The logical corollary of this line of reasoning would seem to be that the Crown should be liable, but section 5(6) of the *Proceedings Against the Crown Act* stands in the way of such a result.

[654] *Great Northern Insurance Co. v. Young, supra*, note 647.

[655] *Gunn's Pure Foods Limited v. Rae* [1934] 2 W.W.R. 108 (Alta. S.C.T.D.).

[656] *Supra*, note 647.

[657] Sewell, *supra*, note 650 at 47.

The theoretical liability of the sheriff's bailiff for a wrongful seizure or sale will be of practical value to an injured party only if a judgment against the bailiff can be enforced. In Alberta, the *Sheriffs Act*[658] and its predecessors used to require the sheriff, deputy sheriff, assistant sheriff and bailiff to provide a bond for "the due and faithful performance of his office". In certain cases of breach of duty by a bailiff, an injured party would have recourse to this bond; however, the *Sheriffs Act* was repealed in 1978,[659] and there is at present no requirement that bailiffs be bonded. So a judgment against a bailiff would not be of great value unless the bailiff's personal resources were sufficient to meet the judgment.

(5) Creditors

(a) The instructing creditor

In effecting seizure under a writ of execution, the sheriff is not regarded as an agent of the instructing creditor. Therefore, for example, if the sheriff's bailiff seizes the goods of a third person, or effects an excessive seizure, the instructing creditor generally incurs no liability. There is, however, an important exception to this rule. The general rule assumes that it is the sheriff who actually decides what to seize. If the creditor[660] intermeddles in the execution process to the extent of telling the sheriff what to seize, the creditor is liable if the sheriff's bailiff commits a tort by following those specific instructions.

The instructing creditor can also incur liability under the indemnity that may be required by the sheriff pursuant to section 4(2) of the ECA. This section provides that a sheriff is not obliged to act on seizure instructions until provided with security that he or she considers to be reasonably sufficient to indemnify him or her in respect of, among other things, any claims for damages to which he or she might become liable as a result of attempting to carry out the instructions. Although the act does not expressly require the creditor to indemnify the sheriff's subordinates, it has been held that an undertaking in favour of "the sheriff" applies in favour of bailiffs as well.[661] To a large extent,[662] this indemnity requirement shifts the risk of mishaps in the seizure process from sheriffs' officers to the instructing creditor.[663]

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[658] R.S.A. 1970, c. 342.

[659] *Court of Queen's Bench Act*, S.A. 1978, c. 51, s. 39(4).

[660] In fact, it is more likely to be the creditor's lawyer who actually gives the instructions to the sheriff. Depending upon the precise facts, it might in fact be the lawyer, the creditor, or both who are liable to the injured party.

[661] *Mandelin v. Stan Reynolds Auto Sales* (1961) 31 D.L.R. (2d) 697. Indeed, since in Alberta the person called "sheriff" is unlikely to incur personal liability, the indemnity would almost be pointless if it did not apply in favour of bailiffs.

(b) Other execution creditors

A creditor who merely files a writ with the sheriff and then sits back to wait for any money that comes his or her way through a sheriff's distribution incurs little risk. Only the creditor who actually instructs the sheriff to effect seizure must provide an indemnity. The instructing creditor bears the entire risk of mishaps, even though all other execution creditors of the debtor will share in the fruits of seizure.

There is one circumstance in which an execution creditor as such can become liable for a wrongful seizure. This is where the creditor fails to make a return that is required by the ECA. Section 30 of that act provides that, if by reason of such failure the sheriff makes an excessive or wrongful levy, "the creditor is liable for any damages occasioned thereby and no action is maintainable against the sheriff in respect thereof".[664]

C. Troublesome Aspects of Existing Law

Perhaps the major complaint that can be made about the existing law in this area is that it is unduly obscure and complicated. The law is a hodgepodge of judge-made and statutory rules. Often, the latter seem to have been drafted with little regard to the former, and it is difficult to say how they fit together.[665]

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[662](...continued)

[662] If the usual form of indemnity required by sheriffs were taken literally, the entire burden would be shifted to the instructing creditor (and the creditor's lawyer, see following note). The indemnitor undertakes in absolute terms to indemnify the sheriff against all liability incurred by the latter; however, it has been stated in at least one case that the indemnity would not apply to deliberate or negligent misconduct by a sheriff's officer, *Mandelin v. Stan Reynolds, ibid.* at 701.

[663] As a matter of fact, the form of indemnity much preferred by sheriffs is the personal undertaking of the creditor's lawyer. Thus, the creditor's lawyer might be required to bear the risk of mishaps in the seizure process.

[664] Again, presumably, the references to the "sheriff" are to be read as also including bailiffs, who are the ones likely to incur liability.

[665] An example of this situation was just mentioned. The *Execution Creditors Act* entitles the sheriff to an indemnity against liability incurred in attempting to effect a seizure. The Alberta courts, however, have long since held that the sheriff himself is basically immune from liability for the actions of his subordinates in carrying out a seizure. So, the indemnity provision is pointless, unless the courts strain to read the indemnity requirement as applying in favour of bailiffs.

The obscurity of the law is exacerbated by the dearth of relatively recent cases in the area. On many points concerning liability for mishaps in the enforcement process, a "recent" case is one decided in this century.

Even where the law is relatively clear, it might well be needlessly complicated. This complexity is particularly evident in connection with the question of *who* is liable for an injury for which someone is undoubtedly liable. This question could be described as the problem of the source of compensation for loss suffered in the enforcement process.

Suppose, for example, that the goods of X are seized and sold in the mistaken belief that they are the goods of Y, an execution debtor. X's lawyer can tell X that he almost certainly has a cause of action for conversion. But against whom? Certainly, X has a cause of action against the bailiff(s) responsible for the sale and against the buyer of the goods. But perhaps the bailiff is not likely to be able to satisfy a judgment for the value of the goods, and the buyer is nowhere to be found. Can X sue the instructing creditor? This will depend on whether the creditor specifically instructed the sheriff to seize and sell the particular goods that belonged to X. If the creditor did not instruct the sheriff to seize and sell those specific goods, the creditor will not be directly liable to X.[666]

At the end of the day, X might well end up being compensated for his loss. But he might just as easily end up with an unenforceable judgment. In either case, the route to compensation seems unnecessarily complicated. There must surely be a way of simplifying the problem of the source of compensation.

Not only are the rules governing the source of compensation complicated, but also they sometimes lead to questionable results. More often than not, when a mishap occurs in the enforcement process that causes someone to suffer a loss, the loss is not really the result of blameworthy conduct on the part of a sheriff's officer or the instructing creditor. The mishap is as likely to be the result of bad luck as bad management — the sort of mishap that is bound to occur every so often in the course of enforcement proceedings. In such cases, it is far from self-evident that any particular individual should have to shoulder the burden of such a fortuitous mishap.

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[666] Even if the instructing creditor was not directly liable to X, the latter might not be without a remedy. He might take an assignment of the indemnity given by the creditor to the sheriff, and then sue the creditor to enforce the indemnity (provided that the bailiff has not been negligent). If the goods have been sold by auction, he might sue the auctioneer. He might have a tracing claim with respect to the proceeds of sale. But none of these remedies would be certain to be available, and their availability certainly does not make X's task any less complex.

D. Proposals for Reform

(1) Basic Principles

(a) Basic liability rules in the act

We have noted that a major drawback of the existing law is that it consists of a hodgepodge of often obscure and sometimes conflicting common law rules and statutory provisions. It would benefit everyone if the basic rules governing compensation for loss suffered in the course of enforcement proceedings[667] were set out in one place. We recommend therefore that the basic compensation rules be set out in the new statute.

RECOMMENDATION 150:

RULES IN ACT

The basic rules regarding compensation for loss suffered in the course of enforcement proceedings should be set out in the statute.

(b) Compensation for any loss-causing mishap

We do not think that there is anything fundamentally wrong with the common law rules that govern the question of when a person has a cause of action for something that goes awry in the enforcement process. For the most part, these rules seem to provide a cause of action in appropriate circumstances. Nevertheless, we think that a few minor improvements can be made to the common law rules. Moreover, it would simplify and clarify things to state in more modern terms the circumstances in which persons involved in or affected by the enforcement proceedings should be entitled to compensation.

For the moment, we shall simply state the principle by which we will be guided in stating the particular rules applicable to particular persons who might suffer a loss. The principle is this. Where a mishap occurs in the enforcement process, any person who suffers a loss as a result of that mishap should be entitled to compensation, unless there is good reason for denying compensation in that particular case.

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[667] Throughout this chapter, we are talking about the sort of loss that is really related to the enforcement process. We do not propose that, if a sheriff's bailiff gets into a traffic accident on the way to effect a seizure, the bailiff's (or his or her employer's) liability should be governed by the statute.

(c) No cause of action if no loss

In the course of carrying out a seizure, it is easy for a sheriff's bailiff to commit technical trespasses to property that do not result in any real injury to the "victim". For example, the bailiff might seize a vehicle that he thinks belongs to the debtor, but actually belongs to a third person. Even if the error is quickly discovered and the vehicle is released from seizure before the third person even knows it has been seized, there would in theory be a cause of action for trespass.

There is little to be gained and much to be lost in financial and judicial resources if a person such as the true owner of the seized vehicle is permitted to assuage his or her wounded feelings through an action for trespass. This is precisely the kind of circumstance in which the court will protect the sheriff on an interpleader application.[668] We believe that it should not be necessary for a sheriff to go to the trouble of having to make an application to the court for protection where the injury suffered by a prospective plaintiff is purely notional. In general, actual pecuniary loss should be a necessary element of a cause of action for any interference or dealing with property by a sheriff in the course of enforcement proceedings.

Courts sometimes award exemplary (or "punitive") damages against a defendant who has committed a wilful and flagrant violation of another person's rights. It is conceivable that a bailiff or creditor, or another person involved in the enforcement process, could be guilty of such high-handed conduct as to move a court to grant exemplary damages. It is conceivable also that such a situation could occur without the victim suffering substantial pecuniary loss. If such a set of circumstances were to arise, we do not think that the absence of substantial pecuniary loss should prevent the court from making an award of exemplary damages. In saying this, however, we emphasize that we are not endorsing any particular theory as to when, if ever, it is appropriate for a court to award pecuniary damages.

RECOMMENDATION 151:

ENTITLEMENT TO COMPENSATION

A person should have a remedy in respect of an interference or dealing with the person's property in the course of enforcement proceedings only if (a) he or she suffers actual pecuniary loss, or (b) the interference or

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[668] When the sheriff makes an interpleader application, the court has a discretion to grant an order protecting the sheriff from actions. The case law is to the effect that the court will exercise its discretion in favour of the sheriff where the claimant has not suffered a substantial grievance: see Dunlop, *supra*, note 1 at 395.

dealing is a result of misconduct that justifies an award of exemplary damages.

(d) A certain source of compensation

We have emphasized that the law on the question "Does X have a cause of action?" is in a more satisfactory state than the law regarding the question "Against whom does X have a cause of action?" The answer to the latter question is likely to be more difficult to come by, and might well be less satisfying than the answer to the former.

We think that perhaps the most useful reform that can be made in this area is to simplify and clarify the issue of where a person who suffers pecuniary loss as a result of a mishap in enforcement proceedings should look for compensation. The best way to do this, we think, is to make it clear that there is one source of compensation for such loss, and that this source will be liable for the loss regardless of who or what causes the loss. What we have in mind is an assurance fund, but we shall defer further discussion of such a fund until later in the chapter.

(2) Circumstances in which Particular Persons Should Be Compensated

(a) Third persons

We have seen that the common law is quite solicitous of the rights of third persons whose property is interfered with or dealt with by a sheriff in the course of attempting to execute a writ. Special circumstances aside, third persons are able to vindicate their rights in the property by an action based on trespass or conversion. That the sheriff acted under the authority of a writ does not make any difference, because the writ only authorizes the sheriff to seize exigible property of the defendant. Nor would it make any difference that the sheriff (or the bailiff) was not guilty of any negligence or wilful wrongdoing.

We believe that the common law reflects the proper principle. Third persons who suffer a loss as a result of any interference or dealing with their property by a sheriff in the course of enforcement proceedings should be compensated. We would only depart from the common law to the extent of saying that it should not be necessary for anyone to be concerned with whether the interference or dealing should be characterized as trespass, conversion or something else. It should not even be relevant whether or not the interference or dealing was authorized by the statute.[669] Subject to the qualifications set out below, the only question should be whether or not the third person has suffered substantial pecuniary injury as a result of some interference or dealing with his or her property in the course of enforcement proceedings.

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[669] For example, it might be reasonable and efficient for the statute to authorize a sheriff to seize any property in which there are reasonable grounds for believing that an enforcement debtor has an interest. Suppose that a sheriff does seize property based on such reasonable

(continued...)

RECOMMENDATION 152:

COMPENSATION FOR THIRD PARTIES

Subject to Recommendations 156 and 157, a third person should be entitled to compensation for pecuniary loss suffered as a result of damage to or any interference or dealing with his or her property in the course of enforcement proceedings.

The first qualification on the principle stated above hardly needs to be stated, but we shall do so anyway. Suppose that a third person buys property from an enforcement debtor in circumstances such that the third person's interest is subordinate to a writ against the debtor. If the sheriff later seizes and sells the property under the writ, this manifestly does cause pecuniary loss to the third person. Although caused by the sale, this loss is merely a consequence of the third person's interest in the property being subordinate to the writ. It is not the sort of loss for which he or she should be compensated (at least by anyone other than the debtor). Therefore, a third person should not be entitled to compensation for any loss suffered because his or interest in certain property is subordinate to a writ of enforcement.

RECOMMENDATION 153:

NO COMPENSATION WHERE INTEREST SUBORDINATE TO WRIT

A third person should not be entitled to compensation for pecuniary loss suffered because his or her interest in property is subordinate to a writ of enforcement.

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[669](...continued)
grounds, but the property turns out to belong to a third person. If the third person suffers some loss as a result of the seizure, it seems eminently reasonable to say that he or she is entitled to compensation, notwithstanding that the sheriff's actions were authorized by the statute.

The second qualification is not as simply explained as the first. It is based on the proposition that it is generally better to stop a loss from occurring in the first place than to compensate the victim after it has occurred. Therefore, it seems reasonable to construct the law so as to encourage persons involved in or affected by enforcement proceedings to act in a way that will minimize the harm done by mishaps in the enforcement process.

Suppose that a sheriff seizes property on the basis of evidence that it belongs to the enforcement debtor. There is also some reason, however, to believe that the property might in fact belong to a third person. Generally speaking, it would be better for everyone concerned if the matter of the ownership of the property is resolved as soon as possible, and certainly before it is sold. In most cases, it is the sale of the property, rather than its mere seizure, that is likely to cause substantial loss to the third person. Thus, if the issue of the third person's interest in the seized property is resolved before the property is sold, any substantial loss is likely to be avoided.

In the interest of heading off loss before it occurs, we think that, where the sheriff knows of a potential adverse claim against seized property, he should be required to notify the potential claimant of the seizure.[670] This notice should advise the third person of the steps that must be taken to assert a claim against the seized property.[671] Having received such notice, the third person should be obliged to assert a claim within a certain period of time, and should bear the consequences of failing to do so. If the time expires and no claim is asserted, the sheriff should be able to proceed on the basis that the third person's silence is an admission that he or she does not have an interest in the property. Specifically, where a third person does not respond in time to the sheriff's notice,[672] he or she should lose any right that might otherwise have been afforded to recover compensation for the seizure and sale of the property.[673]

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[670] The Alberta Rules of Court allow a sheriff who is aware of a claim against seized property to make an interpleader application: see Rules 442(1)(b), 457. However, the interpleader rules are designed for the benefit of the sheriff, not the claimant. In theory, nothing requires a sheriff who knows of a claim to bring interpleader proceedings. The sheriff could sell the property in the face of an adverse claim without making an interpleader application. This might conceivably occur if the creditor was able to convince the sheriff that the claim was without merit and, no doubt, was to provide the sheriff with good security. Of course, a sheriff proceeding in this fashion would be liable for conversion if it turned out that the claimant's claim was well founded. In practice, either through caution or a sense of fair play, a sheriff who knows of an adverse claim will invariably follow the interpleader route. Our proposal would make the law conform with the substance of the existing practice.

[671] The details of the procedure that we contemplate are worked out in the draft act. We summarize them briefly here:

1. the third person must file a claim with the sheriff within 14 days of receiving notice of the seizure;

2. the sheriff would then give notice of the claim to the instructing creditor, who would have 14 days to contest the claim; and

(continued...)

RECOMMENDATION 154:

LOSS OF RIGHT TO COMPENSATION THROUGH DELAY

A sheriff who knows of a potential claim against seized property should be required to give notice of the seizure and of the procedure for asserting a claim to the potential claimant.

A potential claimant who does not assert a claim within 14 days after receiving notice should lose any right to compensation that would otherwise have been afforded in respect of the seizure or sale of the property.

Where a claim is asserted within the relevant period, the instructing creditor (or another enforcement creditor, if the instructing creditor does not do so) should then bear

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[671](...continued)

3. the instructing creditor (or another enforcement creditor) would have to apply to the court to resolve the dispute within a further period of 30 days, failing which the sheriff would be required to release the seizure.

We have omitted some details of the contemplated procedure that are included in the draft statute. The important point is that this procedure would relieve the sheriff of the burden of having to make an interpleader application. Once a claim was asserted, the burden of contesting the claim would fall upon the creditor.

[672] We have in mind a fairly short period. Fourteen days would seem appropriate, as this is the time that a debtor has to file a notice of objection to seizure.

[673] A similar recommendation was made by the Ontario Law Reform Commission: OLRC Part 2, *supra*, note 57, at 263.

the onus of contesting the claim and of applying to the court to determine the issue.

(b) Debtors

By their very nature, successful enforcement proceedings will cause pecuniary loss to the enforcement debtor — property is taken away and used to satisfy debts. Obviously, this is not a loss for which the debtor should expect to be compensated. Thus, the general rule cannot be that the enforcement debtor is entitled to compensation whenever he or she suffers substantial pecuniary loss as a result of damage to or interference or dealing with, his or her property in the enforcement process. Something more must be required. At a minimum, the loss must be the result of an action that is not authorized by the statute.

We should distinguish between restitution of property of which a debtor has been improperly deprived and compensation for consequential loss flowing from the deprivation. If a sheriff seizes more property than is necessary to satisfy all the judgments against the debtor, or seizes exempt property, it goes without saying that the debtor should be entitled to have the excess or exempt property released from seizure.

Where there is room for controversy is in the matter of consequential damages. There are two plausible answers to the question of when debtors should be able to recover compensation for consequential loss. The first is that debtors should be compensated whenever loss results from the failure of someone else to comply with the act. The second is that debtors should be compensated only where there has been negligent or wilful non-compliance with the statute.

We favour the first alternative. A debtor who suffers pecuniary loss as a result of someone else's non-compliance with the statute should be entitled to compensation. It should not be necessary to show that the non-compliance was wilful or negligent. We do not think that this would lead to a flood of claims by debtors based on minor and inadvertent slip-ups. Minor slip-ups will not usually cause the debtor to suffer substantial pecuniary loss, and in the absence of such loss the debtor will have no cause of action.

RECOMMENDATION 155:

COMPENSATION FOR DEBTORS

An enforcement debtor should be compensated for actual pecuniary loss suffered as a result of someone else's non-compliance with the act in the course of enforcement proceedings.

(c) Creditors

At common law, a creditor who hopes to maintain an action against the sheriff[674] must establish two things. First, the creditor must show that there has been a breach of duty, such as a failure to act in a timely manner on instructions to seize. In other words, the sheriff, or someone in the sheriff's office, must have been negligent. Second, it must be shown that the creditor has suffered actual damage as a result of the breach of duty.[675] We think that this is the correct approach. Indeed, we cannot think of any plausible alternative to this approach. Thus, we think that the statute should basically restate the common law position on this point.

RECOMMENDATION 156:

COMPENSATION FOR CREDITORS

An enforcement creditor who suffers actual pecuniary loss as a result of the negligent performance or non-performance of any of the sheriff's duties under the statute should be entitled to compensation for such loss.

(3) Tl Assurance Fund

We suggested earlier that the law in this area would be improved by clarifying and simplifying the problem of the source of compensation for loss suffered in the course of enforcement proceedings. We suggested that there should be a single source of compensation for such loss, and that it should be some sort of assurance fund. In this section we examine this topic in a little more detail.

(a) Why an assurance fund?

We have suggested already the main reason for setting up an assurance fund: to simplify the route to compensation for someone who suffers a loss as a result of a mishap in enforcement proceedings. But could this result not be achieved without setting up an assurance fund, say, by giving injured parties a cause of action against the Crown or against the instructing creditor? Either of these alternatives might achieve some of the benefits that would be achieved by setting up an assurance fund, but we believe that an assurance fund would be the best choice for a number of reasons.

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[674] Although, as we saw earlier in this chapter, the creditor will rarely, if ever, have an action against the sheriff personally. The creditor is more likely to have a cause of action against a bailiff.

[675] Dunlop, *supra*, note 1 at 386.

As compared with the alternative of imposing liability on the Crown — more precisely, on the General Revenue Fund — an assurance fund would have the advantage of internalizing the risk of mishaps in the enforcement process. Thus, the cost of compensating persons injured by mishaps in the enforcement process would be spread among and borne by contributors to the assurance fund: enforcement creditors.[676] This seems more appropriate than imposing the burden on taxpayers generally, as would be the case if the alternative of Crown liability were chosen.[677]

At first glance, it might seem appropriate to make the instructing creditor the source of compensation for any loss suffered by any person as a result of a mishap in the enforcement process. The argument would be that the person who benefits from the enforcement process, should bear the risk of mishaps in this process. But this alternative would have certain obvious drawbacks. In the first place, the instructing creditor might in fact be the person who suffers a loss, so it would be difficult, to say the least, to make him or her the source of compensation for such a loss. Second, it seems unfair to make the instructing creditor liable for injuries suffered by a debtor or third party that might be wholly attributable to the negligence of an employee of the sheriff's office. Third, there would be no guarantee that any particular instructing creditor would be able to satisfy a judgment obtained by an injured person.

The point that creditors benefit from the enforcement system, and should therefore be prepared to shoulder some of the risk of mishaps in the enforcement process, is valid. But it does not support the argument that, when a mishap does occur, the burden should necessarily fall on the enforcement creditor whose misfortune it is to have given the instructions that led to the mishap. The risk of a mishap is present on virtually any occasion that an enforcement creditor instructs the sheriff to take some step. It is largely a matter of chance whether or not the risk materializes in any given case. It seems appropriate therefore to spread the risk among all users of the enforcement system by setting up a creditor-funded assurance fund.

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[676] See *infra*, at 386, 393 ff. Assuming that creditors could include the assurance fund levy in calculating their taxable costs (and we see no reason why they should not be able to do so), part of the cost of the levy would actually be borne by enforcement debtors. Suppose A has a judgment against B, and that the cost of the assurance fund levy is added to A's taxable costs. If A eventually recovers the full amount of his judgment and costs, B will actually have paid the levy. Of course, if A is not fortunate enough to get complete recovery, he will bear the cost of the levy.

[677] We recognize, however, that setting up a specific assurance fund is not the only way of making sure that the burden of compensation payments is borne by users. The Crown could meet compensation claims out of the General Revenue Fund, but could set the basic fees paid by creditors (eg, for registering a writ) at a high enough level to offset such claims, as well as other expenses of operating the system. This is a possible alternative to setting up a specific fund.

RECOMMENDATION 157:

ASSURANCE FUND

Where it is appropriate to compensate a person for loss suffered as a result of enforcement proceedings, the compensation should come from an assurance fund.

(b) Funding the assurance fund

We have indicated already that the assurance fund would be funded through a levy on creditors. Having said that, there are still a variety of ways in which this levy could be set up. Briefly, here is how we think that the system could best be arranged so as to make the levy both fair and easy to administer.

The assurance fund levy should be built into the fee charged for filing a writ in the Enforcement Registry.[678] Since the risk of loss — or at least the amount of any loss suffered — is likely to bear some relationship to the value of the writ, we think that the amount of the levy, and thus the fee for filing a writ, should reflect the amount outstanding on the writ. We do *not* think, however, that the fee should be some fixed percentage of the writ amount. It would not be fair[679] or convenient to make the amount of the fee directly proportional to the amount of the writ. Rather, we prefer a simple three-tiered structure. Holders of writs under amount X would pay a certain fee to register their writ in the Enforcement Registry; holders of writs for an amount between X and Y would pay a somewhat higher fee; and those with writs for an amount in excess of Y would pay the highest fee.[680]

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[678] Not every creditor who files a writ will get a benefit from doing so; many of them will get nothing for their trouble. Thus, it might seem attractive to levy only against money distributed by the sheriff to enforcement creditors. This would ensure that only those creditors who actually benefitted from the process would have to support the fund. In fact, however, a levy on distributions would be borne by the enforcement debtors whose property produced the distributable funds. As a mechanism for spreading the risk of mishaps in the enforcement process, a levy imposed at the time a writ is filed is preferable to one imposed on distributions.

[679] The amount of the assurance fund levy under the *Land Titles Act* does vary directly with the value of the land. In that context, it makes sense to assume that both the benefit provided to the person registering a document and the risk of loss are more or less directly proportional to the value of the land. In our context, neither of these assumptions is true. A person who files a writ for $50 million might never instruct the (continued...)

RECOMMENDATION 158:

FUNDING OF ASSURANCE FUND

The assurance fund should be funded by a levy on enforcement creditors that is included in the fee charged for filing a writ of enforcement in the Enforcement Registry. Writs should be grouped into three levels that are based on their amounts. The levy (and hence the filing fee) should be moderately higher for each successive level.

(c) Exclusive liability of the fund

We do not see any purpose in giving persons who suffer a loss for which they have a claim against the assurance fund the right to sue anyone else. If a person has a claim against the assurance fund for, say, the wrongful seizure and sale of property, it will serve only to complicate matters to allow that person also to sue the bailiff who made the seizure, the creditor who instructed it, or anyone else who might be "responsible" for the loss. Therefore, we think that the assurance fund should be the exclusive source of compensation for any loss

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[679](...continued)
sheriff to take any steps and might never receive a cent from the enforcement system.

[680] Of course, the anticipated demands on the assurance fund will determine the amount of the levy actually charged to persons filing writs. We should note, however, that we do not anticipate that the claims made against the fund would be numerous or for huge amounts. Therefore, the amount of the levy, even for a writ in the upper tier, should be quite modest.

suffered in the course of enforcement proceedings.[681] The fund would be the defendant in any action to recover compensation for such loss.[682]

RECOMMENDATION 159:

EXCLUSIVE LIABILITY OF FUND

The assurance fund should be the exclusive source of compensation for any compensable loss suffered by any person as a result of enforcement proceedings.

(d) Indemnification of the fund

We have concluded that the assurance fund should be the exclusive source of compensation for loss suffered by any person as a result of a mishap in the enforcement process. We do think, however, that the person (or employer of the person) actually responsible for the loss should be required to indemnify the fund in certain circumstances.

We approach the issue of indemnification believing that loss-causing mishaps will inevitably occur in the enforcement process, even if all reasonable care is taken and goodwill is exhibited by those involved in the process. The risk of such loss is properly shared by enforcement creditors through the assurance fund levy.

There are cases, however, where it would be inappropriate for enforcement creditors as a group to foot the bill for a loss, without any recourse against the person responsible for the loss. Such cases arise where the original loss was the result of deliberate misconduct or negligence. In such a case, there is much to be said for requiring the person whose negligence or misconduct has led to the loss to indemnify the fund. Quite apart from considerations of fairness to creditors who are required to pay into the fund, awareness of a potential liability to indemnify the fund for liability occasioned by negligence or deliberate misconduct might have a salutary effect on some participants in the enforcement process.

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[681] What about exemplary damages? We should emphasize that we are noncommittal on the question of when, if ever, a court would be justified in awarding exemplary damages for some action taken in connection with enforcement proceedings. But if a court did see fit to award exemplary damages, such damages would not be compensating the plaintiff for loss suffered. Thus, our recommendation regarding the exclusive liability of the fund would not be applicable to such an award. The fund should be a source of compensation only.

[682] Provision should be made for some person to authorize a payment from the fund to an injured person who has not obtained a judgment, or even commenced an action. Such a person might be the responsible minister.

There are three categories of persons (or institutions) that, because of their relationship to the process, are likely to be in a position to be the author of a loss for which the assurance fund will be liable. They are 1) sheriffs, 2) creditors who instruct a creditor to take some active enforcement measure, and 3) other enforcement creditors. We deal with each of these below.

For obvious reasons, negligence or deliberate misconduct on the part of someone connected with the sheriff's office would have great potential for causing the sort of loss for which the assurance fund would be liable. Fortunately, instances of such negligence or misconduct undoubtedly would be rare; however, where they do occur, there should be institutional responsibility for it. By this, we mean that the Crown, of which the sheriff's office is an emanation, should be liable to indemnify[683] the assurance fund against liability occasioned by negligence or deliberate misconduct within the sheriff's office.

We would apply the same basic rule to creditors who instruct the sheriff to take some active enforcement step. If an instructing creditor knows or ought to know that the instructions given to a sheriff are likely to cause some person to suffer a loss of the sort for which the assurance fund would be liable, the creditor should be required to indemnify the fund if such a loss does occur.

The last category of persons consists of enforcement creditors other than instructing creditors. The scope for anything that such a creditor does or does not do causing anyone to suffer a loss is much smaller than in the case of instructing creditors; however, the possibility is there, especially in the context of required registrations in the Enforcement Registry. The failure of an enforcement creditor to record that his judgment has been paid might lead a sheriff, acting on another creditor's instructions, to effect an excessive seizure. The assurance fund would be liable for any loss suffered by the enforcement debtor, and the delinquent creditor should in turn be required to indemnify the fund.

Our final point on this particular topic concerns security for the instructing creditor's potential obligation to indemnify the fund. As already noted, section 4(2) of the ECA entitles a sheriff to demand "security which he considers to be reasonably sufficient for indemnity" in respect of liability that the sheriff might incur in carrying out seizure instructions. As we have seen, this indemnity really protects the sheriff's bailiff, since the bailiff is the person who will be liable in the case of a wrongful seizure. The form of the security usually required is the personal undertaking of the instructing creditor's lawyer to indemnify "the sheriff" against liability for damages.

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[683] We should clarify our use of "indemnify", here and elsewhere in this section. This word has two senses. One of these, a sense in which it is often used by lawyers, denotes an agreement by one person to reimburse another person for a loss or expense that the latter might suffer in the future. The other denotes the act of actually reimbursing a person for a loss or expense that has actually been suffered. We use "indemnify" in the second sense.

Under the existing practice, the lawyer's undertaking really serves two purposes: it establishes the sheriff's (or the bailiff's) right to be indemnified and provides a form of security for this indemnity. Under our proposals, no individual connected with the sheriff's office will require an indemnity against liability. If there is any liability for anything done by such an individual, it will fall on the assurance fund, not the individual in question. As discussed above, there are circumstances in which the instructing creditor should be liable to indemnify the fund, but such liability will be established by the statute. A lawyer's undertaking would not be required for this purpose.

But what of security for the creditor's potential liability to indemnify the assurance fund? Certainly, there might be cases in which it is doubtful that an instructing creditor would have the wherewithal to pay substantial indemnification to the assurance fund. Nevertheless, we believe that, in general, the instructing creditor should *not* be required to provide security. This could mean that the assurance fund will occasionally not be recouped for a loss that should really be borne by the instructing creditor. But this is much less troubling than for a bailiff who is personally liable not to have an assured source of indemnification.

There might be special circumstances where the instructing creditor's potential liability to indemnify the fund should be secured. We think that such circumstances will be rare enough, however, that the requirement for security should be imposed only by a court, on application by a sheriff.

RECOMMENDATION 160:

INDEMNIFICATION OF ASSURANCE FUND

The Crown should be liable to indemnify the assurance fund for a liability incurred through deliberate misconduct or negligence within the sheriff's office.

A creditor upon whose instructions a sheriff takes an action that causes a loss for which the assurance fund is liable should be required to indemnify the fund if the creditor knew or ought to have known that in following the instructions the sheriff would be likely to cause a loss for which the fund could be liable.

A creditor whose negligent or deliberate failure to register required information in the Enforcement

Registry causes a loss for which the assurance fund is liable should be required to indemnify the fund.

Creditors who give instructions to the sheriff to take some enforcement step should not in general be required to provide security for their potential obligation to indemnify the assurance fund. On application by a sheriff, however, the court should be able to require a creditor to provide such security.

(4) Judicial Discretion in Unusual Circumstances

Most of the recommendations that we have made in this chapter are intended to deal with the typical or general case. The compensation rules proposed in these recommendations would work quite satisfactorily in the great majority of cases. It would be unwise to assume, however, that hard and fast rules based on these recommendations will always provide an appropriate solution to a given case. We think that the court should be given the power to fine tune the liability rules as set out in the act to take into account any unusual circumstances of a particular case.

The most important special circumstance would usually be the conduct of the various parties. In light of the conduct of the parties, the court should be able to deny relief to an injured person who, although able to bring himself or herself within the letter of the relevant statutory provision, is really the author of his or her own misfortune.[684] Or the conduct of the plaintiff might be such as to move the court to make a smaller damage award than would otherwise have been appropriate.

RECOMMENDATION 161:

JUDICIAL DISCRETION

The court should be able to override the specific liability rules set out in the act in special circumstances. These special circumstances would usually relate to the conduct of the various parties. In particular, the court should be able to:

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[684] In other words, the injured party is estopped from asserting his or her strict legal rights, see *384238 Ontario Ltd. v. The Queen, supra,* note 640 at 688-90.

(a) dismiss an action, even where all the statutory requisites for liability are present, or

(b) reduce the damages that would otherwise be payable to a party.

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CHAIRMAN

DIRECTOR

March 1991

PART 3

LIST OF RECOMMENDATIONS

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RECOMMENDATION 1 UNIVERSAL EXIGIBILITY

All the property of a judgment debtor should be subject to enforcement regardless of its form or character, excepting only property that has been excluded deliberately from enforcement. No property should be "exempt" from enforcement for lack of an enforcement procedure.

RECOMMENDATION 2 JUST EXEMPTIONS

The deliberately exempted property should be sufficient to permit debtors to maintain themselves and their dependents at a reasonable standard and to have reasonable security that they will be able to continue to do so in the future.

RECOMMENDATION 3 CREDITOR INITIATIVE

The enforcement process should rely on the initiative of the creditor for its operation. The suggestion, made in other jurisdictions, of an enforcement system operated entirely by a court or government official without specific instructions from creditors should not be adopted in Alberta.

RECOMMENDATION 4 ONE STATUTE

The enforcement of money judgments should be governed by one statute that describes the system of enforcement and the various processes, and the procedures that are a part of it, in consistent, coherent and logically ordered terms.

RECOMMENDATION 5 JUDICIAL SUPERVISION

The various enforcement processes should be designed to minimize the occasions when an application to the court is required; however, the processes should also be designed to permit easy access to the court whenever judicial supervision of a specific aspect of enforcement is required. All parties should have the right to seek the direction of the court on any point that arises in the course of enforcement.

RECOMMENDATION 6 IMPRISONMENT FOR DEBT

The existing policy of prohibiting imprisonment as a remedy to enforce money judgments should be continued.

RECOMMENDATION 7 ONE COMMENCEMENT DOCUMENT

A creditor who wishes to undertake any enforcement process should be required first to deliver to the sheriff a document issued by the clerk of the court certifying that a judgment has been entered against the judgment debtor and setting out such particulars of that judgment as are required for the conduct of enforcement procedures.

RECOMMENDATION 8 THE WRIT OF ENFORCEMENT

The enforcement commencement document should be called the "writ of enforcement".

RECOMMENDATION 9 THE ENFORCEMENT REGISTER

There should be a computer register of all enforcement activity undertaken against each enforcement debtor. The register should be maintained centrally and should be accessible province wide from the offices of all sheriffs. The register should be available for public searches. It should be called the Enforcement Register.

Upon receipt of a writ of enforcement, the sheriff should enter the particulars in the Enforcement Register.

RECOMMENDATION 10 EFFECT OF DELIVERY OF THE WRIT TO THE SHERIFF

When the writ of enforcement has been delivered to the sheriff, the creditor should be able to undertake or instruct any enforcement process. The delivery of the writ of enforcement to the sheriff should authorize the sheriff to accept and carry out the lawful enforcement instructions of the creditor; however, that the writ has been delivered to the sheriff should have no effect on a third party who might deal with the debtor, even where the third party has knowledge of the writ.

RECOMMENDATION 11 ALL PERSONAL PROPERTY BOUND

Upon registration of the writ of enforcement in the PPR, all the personal property of the debtor should be bound. The binding effect should not be confined to the property exigible at common law.

RECOMMENDATION 12 BINDING EFFECT — INTERESTS IN LAND

The debtor's interests in land should be bound only upon registration of the writ in accordance with the provisions of the *Land Titles Act*.

RECOMMENDATION 13 BINDING EFFECT — GARNISHABLE DEBTS

Garnishable debts owed to the debtor should be bound from the time of registration of the writ in the PPR.

The binding effect of the writ in this context should be distinguished from the "binding effect" of service of the garnishee summons. The binding effect of the writ will not affect the conduct of the potential garnishee, who should be able to pay the debt to the debtor notwithstanding the writ. Only the debtor and transferees of the debt from the debtor will be affected.

The word "attach" should be used to describe the effect of serving the garnishee summons on the garnishee.

RECOMMENDATION 14 PROVINCE-WIDE EFFECT

The binding effect of the writ in respect of personal property should be province wide. The present limitation of the effect to property within the judicial district of the sheriff to whom the writ is delivered should be abandoned.

RECOMMENDATION 15 ORDINARY COURSE OF BUSINESS EXCEPTION

A writ registered in the PPR should not affect the interest of a third party in goods acquired from the debtor in good faith, for valuable consideration, without actual knowledge of the writ, and in the ordinary course of the debtor's business.

The course of business exception should also apply to sales by the debtor of seized goods that have been left with the debtor on a bailee's undertaking.

RECOMMENDATION 16 "GARAGE SALE" EXCEPTION

A writ registered in the PPR should not affect the interest of a third party in consumer goods acquired from the debtor in good faith, for valuable consideration, and without actual knowledge of the writ where the consideration paid or the value of the goods does not exceed $1000.

This "garage sale" exception should also apply to sales by the debtor of seized consumer goods that have been left with the debtor on a bailee's undertaking.

RECOMMENDATION 17 NEGOTIABLE INSTRUMENTS EXCEPTION

A writ registered in the PPR should not affect the interest of a holder of a negotiable instrument acquired from the debtor in good faith, for valuable consideration, and without actual knowledge of the writ.

This exception should also apply to transfers by the debtor of seized negotiable instruments that have been left with the debtor on a bailee's undertaking.

RECOMMENDATION 18 MONEY EXCEPTION

A writ registered in the PPR should not affect a person who acquires money from the debtor in good faith or for valuable consideration, whether or not the person had actual knowledge of the writ.

RECOMMENDATION 19 SERIAL-NUMBERED GOODS EXCEPTION

A writ registered in the PPR should not affect the interest of a purchaser of "serial-numbered goods" acquired from the debtor in good faith, for valuable consideration, and without actual knowledge of the writ unless the writ is registered against the serial number specifically.

RECOMMENDATION 20 PRIORITIES BETWEEN SECURITY INTERESTS AND REGISTERED WRITS

A security interest, whether perfected or not, that exists at the time the writ is issued should have priority over the writ, whether the writ is registered or not, except that where there has been seizure under a writ the interest arising by reason of the seizure should have priority over an unperfected security.

RECOMMENDATION 21 TIME OF ISSUING WRIT AND DURATION OF WRIT

The judgment creditor should be allowed to issue a writ of enforcement anytime after entry of the formal judgment and during the time that the judgment is in force.

The existing rule, which says that after six years a writ can be issued only with leave, should be abandoned.

The writ of enforcement should continue in force for so long as the judgment on which it is issued remains in force and the debt remains unsatisfied.

RECOMMENDATION 22 VOLUNTARY FINANCIAL STATEMENT

The enforcement debtor should be given the opportunity to file with the sheriff a sworn statement of his or her assets and liabilities and the dispositions of property he or she has made since the debt was incurred. A simple form, on which such a statement can be made, should be available to debtors from the sheriff. The debtor should be subject to cross-examination on the statement by the creditor. The statement should be available to all enforcement creditors of the debtor.

RECOMMENDATION 23 INFORMATION FOR THE ASSISTANCE OF OTHER CREDITORS

There should be no requirement that a transcript of every examination in aid be prepared, but creditors should be obliged to inform the sheriff's office of examinations held so that this information can be entered in the Enforcement Registry. Other enforcement creditors may order a transcript from the officer who conducted the examination if they wish.

RECOMMENDATION 24 THIRD-PARTY INFORMATION

Where a reasonable possibility that a third party has information regarding the debtor or his or her assets is established, and there is no reason why the third party should not be called upon to reveal the information to the creditor, the court should be able to order the third party to reveal the information to the creditor.

A court order should not be required, however, to compel municipalities to release information as to whether or not an enforcement debtor is shown as the owner of land on municipal tax rolls. A municipality should be required to reveal this information to an enforcement creditor upon payment of a reasonable fee. The municipality might validly require production of a certified copy of the writ of enforcement to be satisfied that the creditor has a legitimate interest in obtaining the information.

RECOMMENDATION 25 SHERIFF'S EXCLUSIVE AUTHORITY TO SEIZE

The present requirement that seizure must be carried out by the sheriff, or a person authorized by the sheriff, should not be changed.

RECOMMENDATION 26 TERRITORIAL AUTHORITY OF THE SHERIFF

Each sheriff should have the authority to effect seizure anywhere in Alberta. A creditor should be at liberty to instruct any sheriff to effect seizure. If the sheriff receiving the instructions considers it more convenient that another sheriff carry out the instructions, or any part of them, then that sheriff should be able to assign the instructions, or any part of them, to another sheriff and give notice of the assignment to the instructing creditor.

RECOMMENDATION 27 SEIZURE INSTRUCTIONS

Written instructions for seizure should continue to be required before the sheriff is obliged to initiate seizure. A standard letter of instruction acceptable to all sheriffs, should be developed.

RECOMMENDATION 28 SEIZURE INSTRUCTIONS — SUBSISTING WRIT

The sheriff should not accept any seizure instructions from a creditor unless the creditor's writ is subsisting at the time the instructions are given.

RECOMMENDATION 29 SECURITY

A creditor who delivers seizure instructions to the sheriff should be required to give security for the fees, charges and expenses of the sheriff in carrying out the instructions. The present requirement of security sufficient to indemnify the sheriff in respect of claims for damages incurred in making seizure should be replaced by an "assurance fund levy", paid at the time of filing the writ of enforcement with the sheriff as described in the recommendations below dealing with the establishment of an assurance fund.

RECOMMENDATION 30 INFORMATION AS TO DEBTOR'S ASSETS

The creditor should be required to provide the sheriff with such information as the sheriff reasonably requires to attempt seizure. The sheriff should be under no duty to attempt seizure until in receipt of such information.

RECOMMENDATION 31 DOCUMENTATION

The seizure instructions should include such documentation as the sheriff will require to complete the instructed seizure.

RECOMMENDATION 32 EFFECTING SEIZURE

The method of effecting seizure should be set out in the statute, and for a "standard" seizure (seizure of non-serial number goods), should consist of the following requirements:

(a) the property to be seized must be identified in the notice of seizure;

(b) the sheriff must go to the premises or other place where the property to be seized is located and do one of the following:

    (i) serve the seizure documents on the enforcement debtor, an occupant of the premises, or a person who appears to be in possession of the property; or

    (ii) if there is no one present upon whom the seizure documents can be served, post the seizure documents on the premises, or attach them to property that is seized.

The sheriff should continue to have the option of attaching a sticker to seized property in order to help identify it and distinguish it from property that is not seized.

If the seizure documents are not served on the enforcement debtor or an adult member of the debtor's household while seizure is being effected, they should be served on the enforcement debtor later.

Service of the seizure documents should be effected by one of the methods of service set out in section 70 of the PPSA.

RECOMMENDATION 33 ENTRY ONTO PREMISES

Entry:

The sheriff should have statutory authority to enter onto the debtor's premises, or the non-residential premises of a third party, to effect seizure.

Unless he has the consent of a third party to enter a third party's residential premises to effect seizure of the debtor's property, the sheriff should have the authority of a court order to do so. Such an order should be granted where there is a reasonable likelihood that exigible property of the debtor is located on the premises of the third party.

Use of Force:

The sheriff should be able to use force to gain entry to the debtor's non-residential premises without a court order.

Forcible entry to any other premises (the debtor's residence or any premises of a third party) should require a court order.

After gaining entry, the sheriff should be able to break an interior door or other closure to gain access to the debtor's property.

Where the sheriff uses force to gain entry to any premises for the purpose of seizure, he should take reasonable care to ensure that the property is secure when he leaves.

Damages to Third Party:

A third party who suffers damages as a result of a forced entry should be compensated unless the third party could reasonably have prevented the damage.

RECOMMENDATION 34 TIME OF SEIZURE

Unless the court orders otherwise, no seizure under a writ of enforcement should be permitted on residential premises between the hours of 9 pm and 6 am.

RECOMMENDATION 35 BAILEE'S UNDERTAKINGS

The existing bailee's undertaking procedure should be continued in the reformed legislation. The form of undertaking should inform the bailee of the consequences of a breach of the undertaking.

RECOMMENDATION 36 REGISTRATION OF NOTICE OF SEIZURE

After effecting seizure, the sheriff should enter the notice of seizure into the Enforcement Registry.

RECOMMENDATION 37 SEIZURE OF SERIAL-NUMBERED PROPERTY

As an alternative to the regular seizure procedure, seizure of serial-numbered property should be effected by registration of a notice of seizure that describes the property by its serial number in the PPR. Such registration should be followed by service of the notice of seizure on the debtor.

Where serial-numbered property is seized by the ordinary seizure process, the exception to the effect of registration of the writ of enforcement in the PPR should continue until the writ is registered against the serial number of the seized property.

RECOMMENDATION 38 PROPERTY IN THE HANDS OF A THIRD PARTY

As an alternative to seizure by the ordinary process, where property of the debtor is in the hands of a third party, the sheriff, on the creditor's instruction, should issue a notice for service on the third party, requiring the third party to deliver the property to the sheriff or to make it available for seizure.

The process should operate in a parallel manner to the process of garnishment of debts owed to the debtor. For example, the third party should be required to respond to the notice if unable to comply with it, and should be liable in the same manner as a garnishee if he or she fails to respond or comply. Compliance with the requirements of the notice should relieve the third party of his or her obligation to the debtor. The third party should be compensated for the cost in complying with the sheriff's requirements.

RECOMMENDATION 39 OBJECTION PROCEDURE

At the same time as the debtor is served with the notice of objection to seizure, he or she should also be served with a document called "Instructions to Debtor", which should include:

a. a simple explanation of the seizure process;

b. a description of the exemptions to which debtors are entitled;

c. an explanation of the court's power to delay removal and sale if the debtor can establish that he or she can pay the debt over time;

d. a description of the process whereby objections are brought before the court to be dealt with;

e. advice as to where the debtor might seek advice and assistance; and

f. a statement that the debtor might become liable for added costs if he or she uses the objection procedure frivolously.

The debtor should be required to state the nature of his or her objection to the seizure in the notice of objection. The sheriff should not reject any notice of objection that states an obviously inadequate reason or is silent as to the reason. The debtor should not be restricted to the reason given on the notice of objection at the removal and sale application.

The sheriff should be required to reject any notice of objection delivered to him more than 14 days after the date of service of the notice of seizure on the debtor, except where otherwise ordered by the court.

The existing procedure of a court application initiated by the creditor who wishes to challenge the debtor's objection should be retained.

The creditor should be obliged to bring the application for removal and sale in the judicial district in which the seizure occurred unless the debtor otherwise consents or the court otherwise orders.

The debtor should be able to consent to the removal and sale of seized property anytime after seizure.

RECOMMENDATION 40 REMOVAL

The sheriff should be required to remove seized property from the debtor, at the time of seizure or anytime thereafter, upon receiving from the creditor instructions to that effect and such security as the sheriff requires to ensure that the cost of removal and storage of the property pending sale is covered.

Where the sheriff takes possession of seized property from the debtor, he should provide the debtor (or whoever was in possession of the property) with a written inventory of the property removed.

RECOMMENDATION 41 SALE INSTRUCTIONS

The sheriff should not proceed to sell the seized property until he has received written instructions from the creditor to do so.

RECOMMENDATION 42 METHOD OF SALE

The creditor should suggest a method of sale at the time that he or she instructs sale. The sheriff, after considering the creditor's suggestion, should use whatever method of sale he thinks will produce the best price.

The sheriff should be able to retain such expert assistance as he reasonably requires to effect a sale, subject to the creditor's willingness to indemnify him for the costs involved.

The sheriff should give the debtor and the creditor notice before the proposed sale, indicating the method of sale that he intends to use. Either the creditor or the debtor should have the right to apply to the court within 14 days of the notice for directions if either objects to the method of sale proposed by the sheriff.

If the sheriff cannot obtain a reasonable price for the property, the creditor should be able to apply to the court for authorization to sell at whatever price the property will bring, except where the reasonable value of the property is less than $1000, in which case the sheriff should be at liberty to sell at the best obtainable price without application.

RECOMMENDATION 43 SALES TO THE CREDITOR

The creditor should be able to buy the seized goods from the sheriff, but where the sale is private the sale should not be concluded unless the price bears a reasonable relationship to the market value of the property and until the debtor has been given notice of the proposed terms of the sale and has had an opportunity to object by application to the court. The objection period should be 14 days.

RECOMMENDATION 44 THE BUYER'S TITLE

The sheriff should be required to inform prospective purchasers of registered encumbrances affecting the debtor's title to the seized property at the time of sale. If he fails to do so and a purchaser is prejudiced as a result, the purchaser should be compensated from the enforcement assurance fund. A purchaser who suffers a loss as a result of the debtor not having had title to the property should also have a right to compensation from the assurance fund.

RECOMMENDATION 45 NEGOTIABLE INSTRUMENTS — SEIZURE

Enforcement against a negotiable instrument held by the debtor should be accomplished by the same seizure process that applies to tangible chattels.

As in the general seizure process, removal of the instrument from the possession of the debtor should not be an essential element of a legally effective seizure, even though it might be required to render the seizure practically effective.

RECOMMENDATION 46 REALIZATION ON NEGOTIABLE INSTRUMENTS

The statute should provide that the sheriff is the agent of the debtor with authority to deal with seized negotiable instruments as fully as would be the case if the debtor had granted such authority.

The present provision that contemplates the sheriff paying or assigning a seized instrument to the creditor should be abolished in favour of the "sale to creditor", which is part of the recommended general seizure procedure.

RECOMMENDATION 47 DEFINITIONS RELATING TO SEIZURE OF SECURITIES

The proposed enforcement system should make special provision for seizure of securities, defined as including:

(a) non-publicly traded shares in corporations;

(b) publicly traded interests in and obligations of corporations and other entities, such as governments, limited partnerships and trusts; and

(c) publicly traded rights to acquire or sell interests or obligations referred to in (b).

For certain purposes, a distinction should be drawn between publicly traded securities and non-publicly traded securities. The latter category would consist only of non-publicly traded shares.

A security would be considered to be publicly traded if it met either of the following two criteria:

(a) the security is listed on a securities exchange; or

(b) prices or values for the security routinely appear in published securities market reports or in quotation services used by securities dealers.

RECOMMENDATION 48 SEIZURE OF SECURITIES

Seizure of securities owned by an enforcement debtor should be accomplished by one of the following methods:

(a) seizure of the security certificates that represent the securities;

(b) service of an appropriately worded notice of seizure on the issuer of the securities where the enforcement debtor is the registered holder of the securities; and

(c) service of an appropriately worded notice of seizure on a broker or other third party who holds the securities for the enforcement debtor.

The method of seizure actually used should be at the discretion of the sheriff, except that seizure by method (b) or method (c) should be permissible only where the notice of seizure can be served on the relevant person (issuer or third party) in Alberta.

The mechanics of seizure should not depend on the place of incorporation or the residence of the issuer; however, where a security issued by a "foreign" issuer is seized, the court should be able to make any order it considers necessary to prevent the issuer, or any other person, from being prejudiced as a result of a conflict between the Alberta laws and the laws of the issuer's home jurisdiction.

Where a notice of seizure is served on the issuer of certain non-publicly traded shares, the issuer should be obliged to indicate this to any third party who makes enquiries regarding the enforcement debtor's ownership of an ability to transfer the shares.

Where seizure is effected by serving a notice of seizure on a third party, the third party should be obliged to hold and deal with the security in accordance with the directions of the sheriff, and should be liable to enforcement creditors for failing to do so.

RECOMMENDATION 49 EFFECT OF SEIZURE ON SUBSEQUENT TRANSFEREES

Regardless of whether a security that is bound by a writ has been seized or not, a purchaser for value who takes possession of the security certificate evidencing the security without knowledge of the seizure or knowledge of the writ, should have priority over the writ.

A person who purchases a publicly traded security in a transaction that is settled through a clearing agency should have priority over a writ that binds the security, as long as at the time of settlement of the transaction the purchaser did not have knowledge that the security was bound by the writ or was under seizure.

RECOMMENDATION 50 DIVIDENDS AND OTHER PAYMENTS

Where the enforcement debtor is the registered holder of a security that has been seized by a method other than serving the notice of seizure on the issuer, the sheriff should be required to serve a copy of the notice of seizure on the issuer as soon after effecting seizure as is practicable.

Where a notice of seizure has been served on the issuer of a security of which the enforcement debtor is the registered holder, the issuer should be required to pay to the sheriff any dividend or other payment that it would otherwise be required to pay to the enforcement debtor.

An issuer should not be liable if its transfer agent pays a dividend to the enforcement debtor after service of a notice of seizure on the issuer unless the transfer agent has been notified of the seizure or 48 hours have elapsed since the notice of seizure was served on the issuer. A transfer agent who does pay a dividend to an enforcement debtor after being notified of a seizure should be liable to indemnify the issuer.

Where the enforcement debtor is not the registered holder of the seized security, and seizure has been effected by serving the notice of seizure on a third party, the third party should be required to divert to the sheriff any dividend or other payment in respect of the security that it would otherwise be required to pay to the debtor.

The sheriff should be entitled to make any election that the enforcement debtor would otherwise be entitled to make with respect to a dividend or other payment.

RECOMMENDATION 51 REALIZATION OF PUBLICLY TRADED SECURITIES

A sheriff who has seized a publicly traded security should be authorized to sell or otherwise realize the security through the normal market mechanism.

Where it would ordinarily be necessary for the enforcement debtor to endorse a security certificate or other document to dispose of the security, the sheriff should be authorized to do so in place of the debtor.

Where the transfer or other disposition of a security would ordinarily require delivery of the security certificate, this requirement should apply to a disposition by the sheriff. If the court is satisfied, however, that:

(a) the security certificate in question appears to have been lost, destroyed or wrongfully taken from the enforcement debtor;

(b) there is no evidence that the missing certificate has got into the hands of a purchaser for value whose interest in the security would have priority over the relevant writ or writs; and

(c) an adequate indemnity bond has been provided to the issuer by the instructing creditor;

then the court should be able to require the issuer to recognize a disposition by the sheriff of the security represented by the missing certificate.

RECOMMENDATION 52 REALIZATION ON SHARES WITH A TRANSFER RESTRICTION

Where the sheriff seizes shares of a debtor in a corporation, and the corporation's incorporating documents, unanimous shareholders' agreement, or other documents restrict or prohibit the right to transfer those shares, such restriction or prohibition should not apply to the sale by the sheriff.

Provisions in such corporate documents that provide for the sale of shares to other shareholders at less than fair value, when enforcement is entered against one shareholder, should be ineffective to frustrate enforcement.

The other shareholders, severally and collectively, and the corporation should have the right to:

a) discharge the debt and have the seizure released;

b) purchase the shares before anyone else;

c) have the corporation wound up before the shares are offered for sale;

d) make any other proposal to the sheriff and creditors as an alternative to the sale of the shares; and

e) seek approval of such a proposal by the court where the sheriff and the creditors do not accept it. The court should approve such a proposal where it will not cause substantial prejudice to the creditors.

The sheriff should give the corporation and the creditors notice of the process by which he proposes to dispose of the shares. That process should include any procedures required by the corporation's incorporating documents that will not prevent the sale. The sheriff should be at liberty to seek directions from the court in establishing the sale process. The corporation should be at liberty to seek the intervention of the court to require the sheriff to include in the proposed method of sale any requirement of the incorporating documents that he has omitted, except those that would prevent the sale. The court should order the sheriff to include the procedure that will not prevent the sale, and the omission of which would be prejudicial to the interests of the corporation.

The enforcement process should be designed so as to give the corporation and the other shareholders generous opportunity to preserve the membership of the corporation, but if they do not or cannot avail themselves of that opportunity, enforcement should not be frustrated. Any restriction on the transferability of shares that would prevent the purchaser from registering the purchase and exercising shareholder rights should not apply in a sale under a writ of enforcement.

RECOMMENDATION 53 FINANCIAL INFORMATION ON THE CORPORATION

Upon service of a notice of seizure in respect of shares of a corporation, and upon seizure of negotiable shares, the sheriff should become entitled to receipt of the financial information to which a shareholder in the corporation is entitled.

The sheriff should use that information to determine the value of the shares against which enforcement is proceeding and in assessing offers made for the shares in the course of the sale process. In conducting the sale, the sheriff should be able to use the information in any way that the debtor could use it.

Where the sheriff is not able to effect a sale at a price he considers reasonable, he should be at liberty to apply to the court for authorization to sell the shares at the best obtainable price.

RECOMMENDATION 54 ENFORCEMENT AGAINST DEBTOR'S INTERESTS AS A SECURED CREDITOR

Enforcement against a debtor's security interest in real property should be accomplished by the sheriff registering a notice of sale, on instruction from the creditor, on the title to the land in which the security interest is held according to the procedure recommended hereafter for enforcement against land.

Enforcement against a debtor's security interest in chattels should be accomplished by the sheriff registering a financing statement in respect of the enforcement against the debtor in the PPR.

The sheriff should also serve a notice of enforcement and a notice of objection on the debtor according to the procedure recommended for the seizure of serial-numbered goods.

RECOMMENDATION 55 REALIZATION ON SEIZED DEBT SECURITY AGREEMENTS

Payments to be made to the debtor under seized debt security agreement should be diverted to the sheriff upon the sheriff serving the party obliged to make those payments with an appropriate notice.

The sheriff should be able to collect the payments due and to enforce the security in the same manner as the debtor if the party obligated under the security agreement is in default.

The sheriff should also be able to sell the security agreement as he would sell any seized property. The present requirement of a court order to authorize such a sale should be abandoned.

RECOMMENDATION 56 EXIGIBILITY OF INTERESTS IN LAND

All interests in land, regardless of whether they are legal, equitable, registered, unregistered, classified as interests in land or classified as personalty, should be exigible, except those that are deliberately exempted. Exigibility should not depend on whether the interest can be classified as an "interest in land".

RECOMMENDATION 57 INITIATION OF SALE OF REGISTERED LAND

Enforcement against interests in registered land should be initiated by the creditor instructing the sheriff to sell the land. The sheriff would then issue a notice of sale, which would be recorded on title and served on the debtor and all parties having an interest recorded on title. The sheriff would enter the notice of sale in the Enforcement Registry.

RECOMMENDATION 58 PROCEDURAL RESTRICTIONS ON ENFORCEMENT AGAINST LAND

The present requirement of a return *nulla bona* before sale of land in enforcement proceedings should be abandoned.

A requirement that the sheriff not sell the land before the expiry of a six-month period from the date of service of the notice of sale on all the parties upon whom service is required should be substituted for the present one-year delay.

The court should have a discretion to order the enlargement or reduction of this six-month delay where it considers it just to do so, and should also have a discretion to impose such terms as it considers just.

The present provision disentitling the creditor to costs of advertising land for sale, where the debt is satisfied by enforcement against goods and chattels, should be abandoned.

RECOMMENDATION 59 METHOD OF SALE

A creditor who instructs the sheriff to issue a notice of sale in respect of land should suggest a method of sale to the sheriff. The sheriff should be at able to accept the creditor's suggestion or choose some other method of sale.

The notice of sale should describe the method of sale that the sheriff intends to use. Any party upon whom the notice of sale is served should be able to apply for an order requiring a particular method to be used if dis-satisfied with the sheriff's choice.

If no such application is made during the 6-month delay period, the sheriff should be at liberty to use the method indicated in the notice of sale.

The court should have the power to make such orders as are required to facilitate the sale process.

RECOMMENDATION 60 COMPLETION OF SALE

The present requirement of an order confirming sale should be replaced by a requirement that the sheriff, upon finding a purchaser, serve notice of that fact on the debtor, on the holders of other encumbrances on the title of the land to be sold, and on the instructing creditor. The notice should recite the terms of the sale.

Any interested party should have the right to apply within 14 days of receipt of service for judicial intervention in the procedure to prevent conclusion of the sale.

The court should order that the sale not be concluded if there has been any deficiency in the procedure that has prejudiced the debtor or any other interested party, if it considers that reasonable efforts to find a buyer have not been made, if it considers any other term of the proposed sale is unacceptable, or if it considers that any other circumstance justifies such an order.

On such an application, the court should give directions to the sheriff for the continuation of the sale process.

If no such application is commenced within 14 days, the sale should be deemed confirmed, the sheriff should be able to deliver a transfer or other closing documentation, and all interested parties should be estopped from making any application to challenge the sale.

RECOMMENDATION 61 DOWER CONSENT TO SHERIFF'S DISPOSITION

The consent of the debtor's spouse should not be required for an enforcement sale of a homestead.

The contingent life interest created by the *Dower Act* should not survive an enforcement sale.

RECOMMENDATION 62 ENFORCEMENT AGAINST JOINT INTERESTS IN LAND

Legislation should make it clear that the interest of a debtor in land held as a joint tenant with another or others is exigible.

There should not be any change to the law regarding the effect of survivorship in joint tenancy on the binding effect of the writ. The binding effect should continue to be subject to the joint tenant's right of survivorship. If the debtor joint tenant dies, so that the debtor joint tenant's interest ceases to exist, the binding effect of the writ of enforcement on that land should be at an end.

RECOMMENDATION 63 ENFORCEMENT AGAINST UNREGISTERED INTERESTS IN LAND

The process proposed for enforcement against registered interests in land should apply as well to cases where the debtor holds an unregistered interest in registered land. Where the debtor owns an interest in unregistered land, the enforcement process should be left for determination of the court on application of the creditor wishing to enforce against it.

RECOMMENDATION 64 TRANSFER OF DUTIES FROM CLERK TO SHERIFF

The present functions of the clerk of the court relating to garnishment should be transferred to the sheriff.

RECOMMENDATION 65 TRANSFER OF PROVISIONS FROM THE RULES

The provisions establishing the garnishment process, both substantive and procedural, should be located in one statute — the same statute in which the provisions relating to the other enforcement processes are located.

RECOMMENDATION 66 GARNISHMENT AS OF RIGHT — ON AFFIDAVIT

Garnishment should continue to be available as of right. The remedy should not be dependant on the discretion of the court, the sheriff or any other official.

The procedure, however, should continue to require the enforcement creditor to file an affidavit in which the facts required to exist before the process can be invoked are established on oath.

RECOMMENDATION 67 OBJECTION PROCEDURE

The enforcement debtor should be served with a copy of the garnishee summons and the garnishee's response.

The enforcement debtor should be given the right to apply to the court for the determination of any objection he or she might have to the garnishment.

The garnishee should be required to state the last known address of the enforcement debtor; or, if that is contrary to a legal or contractual obligation binding the garnishee, the garnishee should be required to give the enforcement debtor notice of the garnishment and of his or her response.

RECOMMENDATION 68 COMPENSATION FOR THE GARNISHEE

The garnishee should be entitled to compensation from each payment made in, or from the fund remaining in his or her hands if the entire indebtedness to the debtor is not required to be paid into court. The amount of the compensation should be established by regulation and should be maintained at a fair level. It should not be less than $25 per payment in.

RECOMMENDATION 69 GARNISHMENT OF JOINT DEBTS

The scope of garnishment should extend to an enforcement debtor's interest in obligations due to the enforcement debtor and another, or others, jointly.

RECOMMENDATION 70 PROTECTION OF THE JOINT OBLIGEES

Where a joint debt is the subject of garnishment, the garnishee should assume that the interests of the various joint obligees are equal, except where the garnishee is by order instructed otherwise.

Where the creditor establishes, on application, that the enforcement debtor is entitled to a greater portion of the joint debt, the garnishee should be ordered to pay the greater sum in response to the garnishee summons.

After payment by the garnishee, but before distribution of the money, either the enforcement debtor or the joint obligee should have the opportunity to establish that the allocation of the joint debt between the joint obligees was inaccurate, and the court should make whatever order is required to correct the allocation.

The garnishee should be required to give notice of his or her payment to the joint obligee. The notice should include clear directions as to how the joint obligee can bring forward an objection.

There should be a prohibition of further garnishments of the same debt, except with leave of the court, until 30 days after the date of the notice to the joint obligee.

RECOMMENDATION 71 ATTACHMENT OF FUTURE ENTITLEMENTS

Subject to the limitations described in the following recommendations, the scope of garnishment should be expanded to permit an enforcement creditor to attach future entitlements of the enforcement debtor.

RECOMMENDATION 72 LIMITATION — OBLIGATION ARISING FROM EXISTING LEGAL RELATIONSHIP

Attachment of future obligations should be limited to such entitlements as might reasonably be expected to arise out of a legal relationship existing between the enforcement debtor and the proposed garnishee at the time of the attachment.

RECOMMENDATION 73 DURATION OF GARNISHMENT

A garnishment of a future obligation should expire one year after the date it is served on the garnishee unless a renewal summons is issued and served before the end of the year.

RECOMMENDATION 74 ADJUSTMENT OF AMOUNT BOUND BY THE GARNISHMENT

The amount attached by the garnishee summons should increase or decrease with the total amount owing on writs of enforcement against the debtor filed with the sheriff.

An enforcement creditor who files a new writ of enforcement should not be able to issue a new garnishee summons to a garnishee already subject to a garnishee summons.

The procedure should ensure that any changes in the total amount owing under writs of enforcement filed with the sheriff are communicated to the garnishee and that the amount bound by the garnishee summons is adjusted accordingly.

RECOMMENDATION 75 DEPOSIT ACCOUNTS

Deposit accounts should not be susceptible to garnishment except in respect of the balance held in the account at the time of service of the garnishment.

RECOMMENDATION 76 PERSONAL COMPENSATION ENTITLEMENTS

An enforcement debtor's possible future entitlement arising out of a cause of action for damages for personal injury or other damages, including the proceeds of a settlement of the cause of action, should be subject to attachment.

RECOMMENDATION 77 DISCRETIONARY EXEMPTION

Where an enforcement creditor issues a garnishee summons against a future obligation, the court, on the application of the enforcement debtor, should have the discretion to exempt such portion of the obligation from attachment as the enforcement debtor can establish is required to pay expenses that were, or will necessarily be, incurred for the enforcement debtor to maintain the future obligation.

The court should have the discretion to impose such terms as are necessary to ensure that the exempted portion of the obligation is used for the purpose for which it is required.

The discretion should not permit the exemption of a portion of a debt that is payable to the enforcement debtor at the time of the service of the garnishee summons.

RECOMMENDATION 88 RESPONSE BY THE GARNISHEE

In the case of garnishment of a future obligation, the garnishee should be required to file a response to the garnishee summons that either acknowledges or denies the existence of the legal relationship upon which the garnishment is founded.

A garnishee who acknowledges the legal relationship should state when it is expected that the future entitlement will become payable and the nature of the contingencies affecting the future entitlement.

Where a renewal garnishee summons is served, a new response should be required from the garnishee.

The garnishee summons should make it clear to a garnishee who denies the existence of the legal relationship that the garnishee summons remains in force, notwithstanding the denial.

RECOMMENDATION 79 SANCTION FOR GARNISHEE'S FAILURE TO RESPOND

If a garnishee fails to file any of the responses that he or she is required to file after the service of the garnishee summons or during the currency of the garnishment, the enforcement creditor should be able to apply for judgment against the garnishee.

On the application, the failure of the garnishee to respond to the summons should give rise to a rebuttable presumption that the garnishee is indebted to the debtor for the full amount claimed in the garnishee summons.

The garnishee should not be estopped from raising in answer to such an application anything that might have been stated in a required response, and no judgment should be awarded against the garnishee except for the amount that would have been payable to the sheriff under the garnishee summons had the garnishee complied with the procedural requirements.

If the application would have been unnecessary had the garnishee complied with the procedural requirements, costs of the application should be awarded against the garnishee notwithstanding that the enforcement creditor is not granted judgment.

The level of costs should be high enough to encourage garnishees to file the answers required by the procedure.

RECOMMENDATION 80 GARNISHEE SET-OFFS

A garnishee should be able to raise any set-off against the enforcement debtor that exists at the time of the garnishment.

A set-off arising after service of a garnishee summons, however, should not be effective as a response to the garnishment unless the garnishee establishes:

a) that the set-off arose pursuant to a binding commitment entered into before service of the garnishment, or

b) that it would be inequitable to deny the set-off.

RECOMMENDATION 81 ATTACHMENT OF AN INSURED CLAIM

Where the garnishee is insured with respect to an attached future entitlement, the garnishee should be permitted to direct the insurer to pay the appropriate portion of the insurance proceeds to the sheriff when liability of the garnishee to the debtor is determined. The insurer should be required to comply with the undertaking.

If the insurer fails to comply, the garnishee should be able to seek indemnity from the insurer in the proceedings brought by the creditor against the garnishee for judgment and should be indemnified if it is established that the garnishee was entitled to insurance coverage and the direction was given.

RECOMMENDATION 82 PAYMENTS INTO COURT IN THE PROCEEDINGS BETWEEN THE GARNISHEE AND THE ENFORCEMENT DEBTOR

Where a contingent future obligation is attached, the garnishee should still be able to make a payment into court to effect a compromise of the litigation or in the course of interpleader proceedings. The garnishee should, however, be obliged to give notice of the garnishment to the clerk of the court.

If the payment in is accepted by the enforcement debtor, the clerk of the court should not make payment out to the enforcement debtor but should be required to pay in accordance with the garnishment.

RECOMMENDATION 83 ONE GARNISHMENT PROCESS

The same procedure should be used for the attachment of present obligations as is used for the attachment of future obligations. The forms should be designed for use in either situation and should clearly communicate to the garnishee the full extent of his or her obligations depending on the nature of the materials filed in support of the garnishment.

RECOMMENDATION 84 CONDITIONS AFFECTING ATTACHABLE DEPOSITS

There should be a statutory list of conditions, similar to the list contained in the English *Supreme Court Act*, 1961, that are deemed not to prevent attachment of a deposit held by an enforcement debtor.

RECOMMENDATION 85 JUDICIAL DISCRETION REGARDING CONDITIONS OR CONTINGENCIES

The court, on application of the enforcement creditor, should be authorized to order:

a) that the condition affecting the debt otherwise attached be waived and the garnishee required to make payment into court, notwithstanding the condition, where the court is satisfied that such an order would cause no prejudice to the garnishee;

b) that the enforcement debtor satisfy the condition, where the court is satisfied that such an order would cause the enforcement debtor no unreasonable prejudice, or

c) that some alternative action be taken to permit the garnishee to make payment pursuant to the garnishee summons, notwithstanding the condition, without suffering prejudice.

No such order should have the effect of requiring the garnishee to make payment into court pursuant to the garnishee summons before the earliest time that he or she could have been required to make such payment pursuant to the terms of his or her relationship with the enforcement debtor.

RECOMMENDATION 86 RETENTION OF WAGE GARNISHMENT

Wage garnishment should be retained as a remedy for judgment creditors.

RECOMMENDATION 87 PROHIBITION ON TERMINATION

The receipt of a garnishee summons by an employer should never be acceptable as a justification, even a partial justification, for dismissal of an employee. Section 115 of the *Employment Standards Code* should be amended by removing the word "sole".

RECOMMENDATION 88 GARNISHMENT OF CURRENT WAGES

A garnishee summons should be effective only in respect of wages payable for the current pay period if it is served 10 days before pay-day. If the pay period is less than 10 days, then the summons should be effective if served five days before pay-day.

RECOMMENDATION 89 FUNDS IN COURT

Garnishment should replace both the stop order and the ECA, section 7, application as the means by which an enforcement creditor can attach a fund in court to which the enforcement debtor is, or might become, entitled. The creditor wishing to enforce against funds in the hands of the clerk should serve a garnishee summons.

RECOMMENDATION 90 RETENTION OF EQUITABLE RECEIVERSHIP

The remedy of receivership should be maintained as an enforcement process available to creditors who have filed writs of enforcement with the sheriff in cases where no other remedy is available or where the available remedy cannot be used effectively.

RECOMMENDATION 91 JUDICIAL INVOLVEMENT

Receivership should be initiated by order of the court. Its availability should continue to be at the discretion of the court, and the court should tailor the remedy to suit the circumstances of the case in which it will be used.

RECOMMENDATION 92 PRINCIPLE GOVERNING DISCRETION

The appointment should be made where the standard enforcement processes cannot be employed effectively and it is just and convenient that a receiver be appointed. The courts should be given a list of factors that can be considered in determining whether or not the appointment is just and convenient. The statute should also make it clear that the remedy is available whether or not the asset is one that is susceptible to the standard enforcement processes. It should also be available regardless of the nature of the impediment or hindrance that prevents use of a standard enforcement process.

RECOMMENDATION 93 SPECIFIC ASSETS

A receivership should be granted only for a specific asset or class of assets. It should not be ordered for the exigible assets of the debtor generally.

RECOMMENDATION 94 THE RECEIVER

A person who is competent and willing to carry out the tasks that will be required in the particular situation, and whose integrity is warranted, should be appointed as a receiver. This might be the sheriff, or in the proper case, and subject to the proper controls, even the creditor.

RECOMMENDATION 95 POWERS AND DUTIES OF THE RECEIVER

The statute should provide that the court can grant the receiver whatever powers are necessary to carry out the receiver's responsibility. There should be no limitation as to the kinds of powers that the court can give the receiver. The powers should be tailored to fit the circumstances. For the sake of clarity, the statute should provide a non-exhaustive list of specific powers that the court might grant. The statute should also list the minimum duties of the receiver.

RECOMMENDATION 96 COURT-FASHIONED ENFORCEMENT PROCESS

The court should have the power to give directions for enforcement against a specific asset when the standard enforcement processes are not suitable. The process ordered should ensure the protection of all interests that require protection.

RECOMMENDATION 97 *IN PERSONAM* REMEDY

Where the sheriff has been unable to realize a specific exigible asset of the debtor because of the interference of the debtor, or for any other reason, the court should have the power to grant an *in personam* order requiring the debtor, if it is within the debtor's power to obey, to deliver up the asset for enforcement or to take any other steps possible to make the asset available for enforcement or to effect a liquidation of the asset or the completion of a sheriff's sale.

RECOMMENDATION 98 THE CHARGING ORDER

The charging order remedy established by the *Judgments Act, 1838* should be abolished.

The charging order procedure provided by the *Partnership Act* for enforcement against a debtor's interest in a partnership should be abolished and replaced by a receivership procedure that accomplishes the same purpose and gives the same protection to other partners.

RECOMMENDATION 99 STRUCTURE OF THE EXEMPTIONS SYSTEM

The present overall structure of the exemptions system should be continued, whereby protection is given to:

a. property that is required to meet basic necessities such as food, clothing and shelter;

b. property that is required by the debtor to earn a livelihood; and

c. a portion of the debtor's income from employment.

The approach taken in the current statute to avoid obsolescence and promote currency of the descriptions of exempt property, through the use of general descriptions for the classes of exempt property with monetary or other forms of limitation, should be continued.

The exemptions provisions should be restructured so that their central focus is not on the participants in any one industry, such as agriculture. Exemptions appropriate for a specific class of debtors should be stated separately from those appropriate for all debtors.

There should be some mechanism to ensure that the monetary limits are altered to account for inflation.

RECOMMENDATION 100 FOOD

There should be an exemption for such food, and products from which food can be made, as is sufficient to provide for the reasonable needs of the debtor and for the debtor's dependants, for the next 12 months.

RECOMMENDATION 101 CLOTHING

There should be an exemption for the necessary clothing of the debtor and for the debtor's dependants.

RECOMMENDATION 102 SHELTER

The present shelter exemption, which exempts the rural debtor's home (one quarter section) regardless of its value, and the urban debtor's home if the debtor's equity in it is less than $40,000, should be continued subject to a reconsideration of the adequacy of the monetary limit.

The rural exemption should apply, however, only if the debtor gains the primary portion of his or her livelihood from farming land that includes the land on which the house is located; otherwise, the rural home should be subject to the same exemption provision as an urban home.

Where the debtor's equity exceeds $40,000 and the house is sold and $40,000 is paid to the debtor, the fund or any portion of it should be exempt from enforcement in the debtor's hands for six months provided the debtor is able to establish that the source of the fund for which such exemption is claimed is the exempt proceeds of an enforcement sale.

Where the debtor owns the exempt home jointly or as a tenant in common with another or others, the exemption limit should be reduced. Only that portion of the standard exemption ($40,000) that equals the debtor's portion of the total equity held by all the co-owners should be exempt. For the purpose of calculating the exemption in such a situation, each joint tenant should be presumed to have an equal share in the equity of the house. The house should not be exempt from enforcement sale if the debtor's share of the equity exceeds the appropriate portion of $40,000.

The monetary limit prescribed by the provision, $40,000 at present, should be adjusted periodically in response to inflation. The process of adjustment should be that recommended below.

RECOMMENDATION 103 FURNITURE

The present exemption of furniture and household furnishings and household appliances to the value of $4000 should be continued, with this monetary limit being adjusted periodically in response to inflation.

RECOMMENDATION 104 MOTOR VEHICLE

There should be an exemption for a motor vehicle to the value of $5000. The provision should not require that the motor vehicle be needed by the debtor for employment or any other specified purpose. The provision should be so structured that, where the debtor's only motor vehicle is worth more than $5000, the debtor's equity up to $5000 should be paid to the debtor and should be exempt for 60 days provided that the debtor can establish that any fund for which such an exemption is claimed is indeed the exempt proceeds of the enforcement sale of the motor vehicle. The monetary limit of this exemption should be adjusted periodically in response to inflation.

RECOMMENDATION 105 MEDICAL AND DENTAL EQUIPMENT

There should be an exemption for medical and dental aids and equipment necessary for the debtor and for the debtor's dependants, with no monetary limit.

RECOMMENDATION 106 PERSONAL SENTIMENTAL MEMORABILIA

There should be an exemption for personal sentimental memorabilia to a value of $500. The monetary limit should be adjusted periodically in response to inflation.

RECOMMENDATION 107 FARM EXEMPTIONS

The present exemptions giving specific protection to farm debtors should be continued, but they should not be the central focus of the reformed exemptions provision. The reformed exemptions provision should be arranged so that exemptions generally available for all debtors are given primary focus.

The exemption of "one tractor" should be abolished since it is redundant to the general exemption of "farm machinery" and "farm equipment". To forestall any restrictive interpretation of the general provision on the basis that there was once but is no more a specific tractor exemption, the general exemption should be expanded to include "farm vehicles".

RECOMMENDATION 108 GENERAL LIVELIHOOD EXEMPTIONS

There should be one general livelihood exemption of such personal property as the debtor requires in his or her occupation to a maximum value of $10,000.

The present "tractor", "motor vehicle required in the debtor's trade or calling" and "books of a professional person" exemptions should be abolished.
The monetary limit of $10,000 should be adjusted periodically in response to inflation.

If one item is selected by the debtor for this exemption and it is worth more than $10,000, the item should be sold, but $10,000 of the proceeds should be paid to the debtor and should be exempt for a period of 60 days. If the exemption is claimed for a group of assets, the total value of which exceeds the monetary limit, some part of the group should be sold and the amount of the proceeds representing the unused portion of the exemption should be paid to the debtor on the same basis.

RECOMMENDATION 109 PERCENTAGE EXEMPTION

The amount of a debtor's wages exempt from enforcement should be determined on a percentage basis.

RECOMMENDATION 110 CALCULATION ON NET INCOME

The percentage exemption should be calculated on the debtor's gross employment earnings, minus the basic statutory deductions: income tax; Canada Pension Plan contributions; unemployment insurance premiums; Alberta Health care premiums; and workers' compensation premiums.

RECOMMENDATION 111 MINIMUM EXEMPTION

There should be a minimum wage exemption. The wages of debtors who earn the minimum or less should be completely exempt from enforcement. The minimum monthly exemption should be $800 for a debtor without dependants. The minimum should increase according to a weighting formula, where the minimum for a debtor with no dependants is weighted as 3, a debtor with one dependant is weighted as 5 (minimum exemption 1330), a debtor with two dependants is weighted as 6 (minimum exemption 1596), and thereafter each additional dependant adds one weighting unit.

The minimum exemption for a debtor with no dependants should be subject to periodic review and adjustment for inflation, and if it is altered the minimum exemptions for debtors with various numbers of dependants should be adjusted according to the weighting formula described above.

The employer should rely on information supplied by the debtor in the TD1 (or equivalent) form filed with the employer to determine the number of dependants to use in the calculations. The debtor's spouse should be regarded as a dependant if the debtor has claimed any amount for a "supported" spouse on the that form.

The creditor should continue to have the right to apply for a reduction of the amount of the exemption to reflect earnings of the debtor's spouse.

RECOMMENDATION 112 APPROPRIATE PERCENTAGE

The percentage for the percentage exemption should be 50% of the debtor's earnings in excess of the minimum exemption.

RECOMMENDATION 113 MAXIMUM EXEMPTION

There should be a maximum exemption of triple the amount of the minimum exemption for a debtor without dependants, and the difference between the minimum and maximum exemptions should be constant, regardless of the number of dependants.

RECOMMENDATION 114 PROPORTIONAL ADJUSTMENT OF MAXIMUM AND MINIMUM EXEMPTIONS FOR PORTIONS OF A MONTH

The amount of the maximum and minimum exemptions should be increased or decreased proportionately where the period for which the wages or salary is payable is greater or less than one month, assuming that the debtor has earned income for the whole month. If the debtor is employed only during part of a month, however, the full maximum and minimum exemptions should apply.

RECOMMENDATION 115 SCOPE OF EXEMPTION

The exemption should not apply to income from property. It should apply only to income from employment, which might be defined as including wages, salary, commissions or remuneration for work, however computed.

RECOMMENDATION 116 EXEMPTION OF FUTURE SECURITY PLANS

The government should establish a policy for the exemption from enforcement of future income security plans and should review the present policy for the exemption of insurance contracts from enforcement.

RECOMMENDATION 117 ABSCONDING DEBTOR

The denial of exemptions to debtors who have absconded or who are about to abscond should be abolished; however, exemptions should not apply to property that the debtor has abandoned.

RECOMMENDATION 118 DEBTS ARISING FROM CRIMINAL ACTIVITY

Exemptions should continue not to apply to enforcement of debts arising from criminal activity; however, the language of the provision establishing the exemption should be improved so that it is clear that it does not intend to refer to a restitution order under the Criminal Code.

If otherwise exempt property is sold under this exception, and if the proceeds are greater than those required to satisfy the debt, the surplus should be returned to the debtor. It should not be distributed to other enforcement creditors.

RECOMMENDATION 119 CORPORATIONS

The reformed legislation should provide expressly that exemptions do not apply to corporations or partnerships.

RECOMMENDATION 120 ALIMONY AND MAINTENANCE CREDITORS

Generally, exemptions should not apply to the enforcement of alimony or maintenance judgments and orders; however, a debtor should be entitled to the exemption for wages granted by the regulations under the *Maintenance Enforcement Act*, regardless of whether the alimony or maintenance creditor proceeds under that act or under the general enforcement procedures.

If otherwise exempt property is sold pursuant to this exception, and if there is a surplus of proceeds after the debt is satisfied, the surplus should be returned to the debtor. It should not be distributed to other enforcement creditors.

RECOMMENDATION 121 ROOM AND BOARD CREDITOR

The exception to wage exemptions for debts contracted for board and lodging should be abolished.

RECOMMENDATION 122 CREDITOR FOR PRICE OF EXEMPT PROPERTY

The exemptions provisions should apply to the enforcement of a judgment for the price of the exempt property. The present exception should be abolished.

RECOMMENDATION 123 HOSPITAL CREDITORS

The limited exception created by section 8 of the *Exemptions Act* for hospital creditors should be abolished.

RECOMMENDATION 124 CROWN CREDITORS

The reformed exemptions legislation should provide expressly that the Crown is bound by it.

RECOMMENDATION 125 ADJUSTMENT FOR INFLATION

The lieutenant governor in council should examine the monetary limits for specific exemptions and the minimum wage exemption at least every three years, and the limit or minimum should be adjusted accordingly if it is considered that any of them have been eroded by inflation.

RECOMMENDATION 126 EXEMPTIONS EXIST AS OF RIGHT

The reformed legislation should provide expressly that exemptions, with one exception, are applicable automatically. The procedure mandated by Stevenson D.C.J. in *Carmar Holdings v. Harpe* should be incorporated into the reformed legislation. The exception should be the shelter exemption. Land against which enforcement proceedings are taken should be presumed not to be exempt unless the debtor claims the exemption.

RECOMMENDATION 127 WAIVER OF EXEMPTIONS

Exemptions should not be waivable by the debtor.

RECOMMENDATION 128 RELEVANT TIME

The determination of whether or not property is exempt should be based on the facts at that stage of the enforcement process when the issue of exemptions is relevant. Property exempt at the time of seizure, but no longer exempt at the time of the application for the sale order, should not be considered exempt, and *vice versa*. The exemptions should be considered exemptions from enforcement, and not from seizure.

RECOMMENDATION 129 EXTENDED EXEMPTION

Where the debtor is paid the exempt portion of the proceeds of an enforcement sale, or where exempt property is voluntarily sold by the debtor, the fund should be exempt for 60 days following the conversion, provided that the debtor keeps the fund separate from all other funds. This extended exemption should be lost if the fund is mixed with other funds. In the case of the sale of the debtor's house, the period of the extended exemption should be six months.

RECOMMENDATION 130 SURVIVAL OF EXEMPTIONS

Exemptions from enforcement should continue to apply after the death of the debtor as provided for at present. The debtor's spouse and minor children should be able to claim the deceased debtor's exemptions also where the judgment being enforced was obtained against the estate after the debtor's death.

RECOMMENDATION 131 SELECTION WITHIN THE CLASS

The debtor should continue to have the right to select the particular items in an exempt class of property that shall be exempt. The debtor should be required to make the selection at the time of seizure. If the debtor fails to do so, the selection should be made by the sheriff's officer conducting the seizure.

RECOMMENDATION 132 INSTRUCTION TO SHERIFF

The sheriff should be instructed by the reformed legislation not to seize property that appears to be exempt. The instruction should be subject to the same qualifications as appear now in section 7 of the *Exemptions Act* and in section 45 of the *Seizures Act*.

RECOMMENDATION 133 DISPUTE RESOLUTION

The creditor should continue to have a right to apply for an order declaring any specified property of the debtor to be not exempt from enforcement.

The requirement that the sheriff refer any dispute over the claim of an exemption to the court should be continued.

RECOMMENDATION 134 EXEMPTIONS FROM DISTRESS SEIZURE

The present section 2 of the *Exemptions Act*, which deals with an unrelated matter, exemption from distress seizure by a landlord for rent, should be moved to another appropriate statute, probably the *Landlord and Tenant Act*.

RECOMMENDATION 135 THE SHARING PRINCIPLE

The existing policy foundation of the ECA, the sharing principle, should be retained. The proceeds of enforcement processes against a judgment debtor should be shared among the judgment creditors of that debtor proportionally according to the amount of the creditors' individual judgments.

RECOMMENDATION 136 APPLICATION TO ALL ENFORCEMENT PROCESSES

All monies that come into the sheriff's hands because of the existence of a writ of enforcement, regardless of the process by which the money was raised, should be distributed among enforcement creditors according to the sharing principle.

RECOMMENDATION 137 DIRECT PAYMENTS

The sharing principle should not be applied to direct payments made by an execution debtor to an execution creditor.

RECOMMENDATION 138 SUBSISTING WRITS OF ENFORCEMENT

Distribution of enforcement proceeds should be made only among those creditors whose writs of enforcement or statements as to the status of the judgment debt owed to them have been delivered to the sheriff and have been registered in the Enforcement Registry within the year preceding the distribution.

A writ of enforcement should be considered "subsisting" until one year has elapsed from either the date of its entry in the Enforcement Registry or the date on which the most recent statement of status was registered in the Enforcement Registry.

The present requirements, that a creditor advise the sheriff of any payments received in satisfaction of the judgment debt and of any agreement whereby proceedings under a writ or execution are to be stayed or suspended, should be continued. In the latter case, the writ should cease to be subsisting during the suspension.

RECOMMENDATION 139 PROVINCE WIDE DISTRIBUTION

Distribution of enforcement proceeds should be made on a province-wide basis. Every creditor who has a subsisting writ of enforcement against the debtor in the Enforcement Registry should share, regardless of the sheriff to whom the writ was delivered originally for registration in the Enforcement Registry.

RECOMMENDATION 140 THE CERTIFICATE PROCESS

The certificate procedure contained in the ECA should be abolished.

RECOMMENDATION 141 THE GRACE PERIOD

The 14-day grace period provision should be abolished. The sheriff should make distribution to those creditors in respect of whom he holds a subsisting writ of enforcement at the time that he receives a fund for distribution.

RECOMMENDATION 142 THE RESERVED SHARE

Section 41 of the ECA, which contemplates a judge ordering the sheriff to levy in respect of a claim that a debtor has disputed and the sheriff holding a "reserved share" of the proceeds for the creditor until the claim has been reduced to judgment, should be abolished.

RECOMMENDATION 143 APPLICATION TO THE CROWN

The reformed legislation should provide expressly that it applies to the Crown where the crown debt does not have priority by virtue of statute or crown prerogative.

RECOMMENDATION 144 PREFERRED PAYMENT TO THE ACTIVE CREDITOR

The creditor who instructs and directs an enforcement process that produces a distributable fund should receive a preferred payment of the taxable costs expended in the course of the successful enforcement process plus 15% of the proceeds of the enforcement process, after the taxable costs have been paid. The present priority for the costs of the successful creditor should be abolished. The distributive shares should be calculated after the taxable costs relating to the successful enforcement effort and the preferred payment have been deducted from the enforcement proceeds.

RECOMMENDATION 145 WAGE EARNER PRIORITY

The wage earner priority created by the ECA should not be continued in the reformed legislation. The subject should be left entirely to the *Employment Standards Code,* which should be amended if it does not at present contain all that the Legislature wants to grant by way of special priority to wage earners. The reformed enforcement legislation should require the sheriff merely to honour the preferences and priorities established by other statutes when making a distribution.

RECOMMENDATION 146 DISTRIBUTION OF PROCEEDS OF ENFORCEMENT AGAINST LAND

The sharing principle should apply to the distribution of the proceeds of an enforcement sale of land.

RECOMMENDATION 147 INTERVENING ENCUMBRANCES

An intervening encumbrance on property that is sold in enforcement proceedings should be subordinate only to those writs that were on title before the encumbrance was registered.

As between enforcement creditors, the sharing principle should apply notwithstanding the presence of an intervening encumbrance.

Where "partially exempt" property that is subject to an intervening encumbrance is sold, the amount otherwise payable to the enforcement debtor as exempt proceeds should be reduced by the amount paid out of the proceeds on the intervening encumbrance.

RECOMMENDATION 148 OFF-TITLE WRITS

In the distribution of enforcement proceeds, no distinction should be made between writs that bound the property that is the source of the proceeds and writs that did not.

Registration of writs against the title to debtors' land should be made as easy as possible, if not an automatic consequence of registration of the writ in the Enforcement Registry.

Until automatic registration is possible, the fact that a writ has been registered against the title to a debtor's land, along with a legal description of the land, should be recorded in the Enforcement Registry, for the information of other enforcement creditors.

RECOMMENDATION 149 DISTRIBUTION OF SURPLUS RESULTING FROM ENFORCEMENT OF PRIOR SECURITY INTEREST OR ENCUMBRANCE

A surplus resulting from the enforcement of a security interest in any property bound by a writ should be paid to (or retained by) the sheriff, who should then distribute the funds in the same manner as funds realized through enforcement proceedings, taking into account any exemptions to which the enforcement debtor is entitled.

RECOMMENDATION 150 RULES IN ACT

The basic rules regarding compensation for loss suffered in the course of enforcement proceedings should be set out in the statute.

RECOMMENDATION 151 ENTITLEMENT TO COMPENSATION

A person should have a remedy in respect of an interference or dealing with the person's property in the course of enforcement proceedings only if (a) he or she suffers actual pecuniary loss, or (b) the interference or dealing is a result of misconduct that justifies an award of exemplary damages.

RECOMMENDATION 152 COMPENSATION FOR THIRD PARTIES

Subject to Recommendations 156 and 157, a third person should be entitled to compensation for pecuniary loss suffered as a result of damage to or any interference or dealing with his or her property in the course of enforcement proceedings.

RECOMMENDATION 153 NO COMPENSATION WHERE INTEREST SUBORDINATE TO WRIT

A third person should not be entitled to compensation for pecuniary loss suffered because his or her interest in property is subordinate to a writ of enforcement.

RECOMMENDATION 154 LOSS OF RIGHT TO COMPENSATION THROUGH DELAY

A sheriff who knows of a potential claim against seized property should be required to give notice of the seizure and of the procedure for asserting a claim to the potential claimant.

A potential claimant who does not assert a claim within 14 days after receiving notice should lose any right to compensation that would otherwise have been afforded in respect of the seizure or sale of the property.

Where a claim is asserted within the relevant period, the instructing creditor (or another enforcement creditor, if the instructing creditor does not do so) should then bear the onus of contesting the claim and of applying to the court to determine the issue.

RECOMMENDATION 155 COMPENSATION FOR DEBTORS

An enforcement debtor should be compensated for actual pecuniary loss suffered as a result of someone else's non-compliance with the act in the course of enforcement proceedings.

RECOMMENDATION 156 COMPENSATION FOR CREDITORS

An enforcement creditor who suffers actual pecuniary loss as a result of the negligent performance or non-performance of any of the sheriff's duties under the statute should be entitled to compensation for such loss.

RECOMMENDATION 157 ASSURANCE FUND

Where it is appropriate to compensate a person for loss suffered as a result of enforcement proceedings, the compensation should come from an assurance fund.

RECOMMENDATION 158 FUNDING OF ASSURANCE FUND

The assurance fund should be funded by a levy on enforcement creditors that is included in the fee charged for filing a writ of enforcement in the Enforcement Registry. Writs should be grouped into three levels that are based on their amounts. The levy (and hence the filing fee) should be moderately higher for each successive level.

RECOMMENDATION 159 EXCLUSIVE LIABILITY OF FUND

The assurance fund should be the exclusive source of compensation for any compensable loss suffered by any person as a result of enforcement proceedings.

RECOMMENDATION 160 INDEMNIFICATION OF ASSURANCE FUND

The Crown should be liable to indemnify the assurance fund for a liability incurred through deliberate misconduct or negligence within the sheriff's office.

A creditor upon whose instructions a sheriff takes an action that causes a loss for which the assurance fund is liable should be required to indemnify the fund if the creditor knew or ought to have known that in following the instructions the sheriff would be likely to cause a loss for which the fund could be liable.

A creditor whose negligent or deliberate failure to register required information in the Enforcement Registry causes a loss for which the assurance fund is liable should be required to indemnify the fund.

Creditors who give instructions to the sheriff to take some enforcement step should not in general be required to provide security for their potential obligation to indemnify the assurance fund. On application by a sheriff, however, the court should be able to require a creditor to provide such security.

RECOMMENDATION 161 JUDICIAL DISCRETION

The court should be able to override the specific liability rules set out in the act in special circumstances. These special circumstances would usually relate to the conduct of the various parties. In particular, the court should be able to:

(a) dismiss an action, even where all the statutory requisites for liability are present, or

(b) reduce the damages that would otherwise be payable to a party.

PART 4

EXPLANATORY CHARTS

Chapter 1 - General Principles Of Reform

GENERAL PRINCIPLES OF REFORM

- **UNIVERSAL EXIGIBILITY**
  - All the debtor's property should be subject to enforcement except property that is deliberately made exempt from enforcement.
- **JUST EXEMPTIONS**
  - Deliberately exempted property should be sufficient to permit debtors to maintain themselves and their dependents at a reasonable standard.
- **SHARING PRINCIPLES**
  - All proceeds of enforcement should be shared pro rata among enforcement creditors.
- **CREDITOR INITIATIVE**
  - Enforcement process should be creditor-driven, rather than being dependent on the initiative of a government official.
- **COHERENCE AND CONSISTENCY**
  - The enforcement process should be governed by one statute that describes the system of enforcement and its various processes in a consistent, coherent and logically ordered way.
- **JUDICIAL SUPERVISION**
  - Should be kept to a minimum, but parties should have easy access to the court when they require it.
- **IMPRISONMENT FOR DEBT**
  - Imprisonment should continue not to be a remedy for the enforcement of money judgments.

CHAPTER 2 - WRIT OF ENFORCEMENT

WRIT OF ENFORCEMENT

- **ISSUED BY CLERK**
  - May be issued any time after judgment is entered while the judgment remain in force.
  - Contains particulars of the judgment.
  - Endures as long as the judgment is in force.
- **DELIVERED TO SHERIFF**
  - Assurance fund fee [see Chapter 11] payable on delivery of writ.
  - After delivery of the writ, the sheriff may carry out the creditor's lawful enforcement instructions.
  - Sheriff registers the writ in the Enforcement Registry.
  - Creditor is now an "enforcement creditor".
    - **ENFORCEMENT REGISTRY**
      - Electronic registry of all enforcement activity against enforcement debtors.
      - Province-wide access for entry of information by all sheriffs' offices.
      - Province-wide search access for enforcement creditors from sheriffs' offices and from private terminals.
- **REGISTERED IN PERSONAL PROPERTY REGISTRY (PPR)**
  - **BINDING EFFECT**
    - After registration in PPR, the writ binds all the debtor's personal property in the province.
    - Any transfer of or other dealing by an enforcement debtor with property bound by a writ is subject to the writ. But there are five exceptions.

WRIT OF ENFORCEMENT

- REGISTERED IN PERSONAL PROPERTY REDGISTRY
  - ***BINDING EFFECT***
    - ***EXCEPTIONS***
      - 1. Transfers of goods in the ordinary course of the debtor's business.
      - 2. Transfers of consumer goods worth less than$1,000.
      - 3. Transfers of negotiable instruments.
      - 4. Transfers of "serial numbered goods" where the writ is not registered against such goods by serial number.
      - 5. Transfers of money.
      - The first four exceptions apply only in favour of a transferee for value without knowledge of the writ.
      - The fifth exception applies in favour of transferees for value of money even if they have knowledge of the writ.
    - Security interests in personal property that attach before a writ is registered in the PPR have priority over the writ even if the security interest is not perfected when the writ is egistered. But where there is a seizure under a writ, the interest arising by reason of the seizure has priority over an unperfected security interest.
- REGISTERED AGAINST TITLES TO LAND IN WHICH THE DEBTOR HAS AN INTEREST
  - Effect of registration is that the debtor's interest in the land is bound, and cannot be dealt with by the debtor except subject to the writ.

CHAPTER 3 - DISCOVERING THE DEBTOR'S ASSETS

DISCOVERING THE DEBTOR'S ASSETS

- **VOLUNTARY FINANCIAL STATEMENT**
  - Enforcement debtor can file a statement in prescribed form with the sheriff.
    - Purpose is to permit distinction to be made between "can't pay" and "won't pay" debtors.
    - Contents include list of assets, liabilities and dispositions of property.
    - Statement is sworn by the debtor.
    - Debtor is subject to cross-examination on the statement.
- **EXAMINATION IN AID OF ENFORCEMENT**
  - Present procedures are continued.
  - Examining creditors obliged to inform sheriff that examination has been conducted.
    - Fact that an examination has been conducted is recorded in the Enforcement Registry.
  - Other enforcement creditors are entitled to order transcripts from the reporter.
- **THIRD PARTY INFORMATION**
  - Court may order a third party to reveal relevant information concerning a debtor's asset where the third party will not be prejudiced by doing so.
  - A court order is not required for an enforcement creditor to obtain information from a municipality as to the ownership of land shown on the municipal tax rolls.
    - Municipality may require proof of the existence of a subsisting writ of enforcement.

CHAPTER 4 - SEIZURE: THE GENERAL PROCESS

SEIZURE: THE GENERAL PROCESS

INSTRUCTIONS TO SEIZE

- Any creditor with a subsisting writ may issue seizure instructions to a sheriff.
- Seizure instructions must include:
  - security for sheriff's costs of seizure;
  - information about the debtor's assets;
  - seizure documentation.
- Security for indemnity of sheriff against liability is not required: replaced by assurance fund levy when writ is filed. [See Chapter 11]
- Instructions can be given to any sheriff 's office in the province: an alias writ is unnecessary.

SHERIFFS' SEIZURE AUTHORITY

- Seizures must be conducted by sheriff 's officer: no private bailiffs.
- Every sheriff's office has province-wide authority to effect seizure: not restricted to boundaries of own judicial district.
- Seizure instructions may be assigned by one sheriff's office to another where convenient to do so.

ENTRY OF PREMISES

- Sheriff authorized by statute to effect non-forcible entry of premises occupied by the enforcement debtor or non-residential premises of a third party.
- Either a court order or the permission of the occupant is required for the sheriff to effect entry of residential premises that are not occupied by the enforcement debtor.
- Statute authorizes the sheriff to effect a forcible entry of an enforcement debtor's non-residential premises.
- A court order is required for the forcible entry of any premises other than the debtor's non-residential premises.

SEIZURE: THE GENERAL PROCESS

MECHANICS OF SEIZURE

- Seizure is effected when:
  - property to be seized has been identified in the notice of seizure;
  - sheriff has gone to the place where the property is located and done either of the following:
    - served the seizure documents on the enforcement debtor, another occupant of the place where the goods are located, or someone who apparently has possession of the property; or
    - if no one is present upon whom the seizure documents can be served, posted the seizure documents on the premises or attached them to property being seized.
- Sheriff continues to have the option of using stickers to help identify seized property.
- Where the seizure documents are not served on the enforcement debtor or an adult member of the debtor's household at the time of seizure, they must be served on the debtor after the seizure has been effected.
- Seizure at residential premises must be effected between 6:00 am. and 9:00 pm.
- Existing bailee's undertaking procedure is continued.
- Alternative method for seizing serial numbered goods:
  - seizure of serial numbered goods may be effected by serving the seizure documents on the enforcement debtor and registering an appropriate notice in the personal property registry.
- Alternative procedure for property in the hands of third persons:
  - enforcement creditor may instruct a sheriff to issue a notice to a third person who has possession of an enforcement debtor's property , the notice would require the third person to deliver the property to the sheriff or make it available for seizure.

- the effect of the notice would be similar to the effect of a garnishee summons on the garnishee.

OBJECTION PROCEDURE

- Continued as at present except:
  - seizure documents served on the enforcement debtor include "instructions to debtor", which explain the seizure process, exemptions, the objection procedure, and so forth.
  - notice of objection form invites the debtor to state the reason for objection, but
    - a notice of objection is valid even if it does not include reasons, and
    - the debtor may raise different or additional reasons on an application for removal and sale.
  - notice of objection must be filed within 14 days of service of the seizure documents on the enforcement debtor.

REMOVAL AND SALE

- **REMOVAL FOR SAFEKEEPING**
  - Instructing creditor may require the sheriff to remove seized property at the time of seizure, if satisfactory provision is made for the cost of doing so.
  - If the instructing creditor has not instructed the sheriff to remove the seized property, the sheriff has the discretion to do so.
- **REMOVAL FOR THE PURPOSES OF SALE**
  - Seized goods may be removed and sold without order if no objection is filed.
  - If an objection is filed, the present procedure for obtaining an order for removal and sale is continued. The application must be made in the judicial district in which the seizure occurred.
  - The enforcement debtor may consent to the removal and sale of the seized property.

SEIZURE: THE GENERAL PROCESS

- REMOVAL AND SALE
  - **SALE PROCEDURE**
    - Instructing creditor must give the sheriff written instructions to sell.
    - Instructions must propose a method for selling the seized property. The sheriff determines the method of sale, taking the creditor's proposal into account.
    - Sheriff may retain appropriate experts or agents to assist in the sale.
    - Sheriff must advise the enforcement debtor and the instructing creditor of the proposed method of sale: if either objects, an application can be made to the court.
    - If the sheriff is unable to obtain a reasonable price for the seized property, the court may authorize its sale at the best possible price. If a reasonable price for the seized property would not in any event exceed $1,000, the sheriff may sell it for the best obtainable price without a court order.
    - Sale of seized property to an enforcement creditor is permitted, but seized property cannot be sold to an enforcement creditor through a private sale unless the debtor is first given notice of the terms of the proposed sale.
  - **THE BUYER'S TITLE**
    - Sheriff must inform prospective buyers of seized property of any registered encumbrances affecting the property.
    - Buyer who suffers a loss as a result of the debtor not having clear title should be compensated by the assurance fund.

CHAPTER 5 - SPECIAL - SEIZURE MECHANISMS

SPECIAL SEIZURE MECHANISMS

- **ENFORCEMENT AGAINST NEGOTIABLE INSTRUMENTS**
  - Enforcement against negotiable instruments is effected by seizure of the instrument in the same manner as is proposed for other tangible property.
  - Sheriff is given statutory authority to deal with a seized negotiable instrument as if the sheriff were the debtor's agent.
    - Sheriff may not "pay" the seized instrument to an enforcement creditor in satisfaction of the debt, but the creditor may buy the instrument in accordance with the ordinary sale procedure for seized property.
- **ENFORCEMENT AGAINST SECURITIES**
  - **METHOD OF SEIZURE**
    - Three alternatives for effecting seizure:
      - seizure of the security certificate;
      - service of a notice of seizure on the issuer, where the enforcement debtor is the registered owner of the security;
      - service of a notice of seizure on a third party ("intermediary") who holds the security for the enforcement debtor.
    - Second and third alternatives are only available where the notice of seizure can be served on the relevant person (issuer or intermediary) in Alberta.
    - Where "a foreign issuer" is involved, the court may make an order to prevent the issuer or any other person from being prejudiced by a conflict between Alberta law and the law of the issuer's home jurisdiction.
    - Where the enforcement debtor is the registered owner of a security, and seizure was not effected by serving a notice of seizure on the issuer, the sheriff must serve notice on the issuer as soon as possible.

SPECIAL SEIZURE MECHANISMS

ENFORCEMENT AGAINST SECURITIES

- **EFFECT OF SEIZURE**
  - Where the issuer has been served with notice of seizure of a security of which the enforcement debtor is the registered owner, the issuer must
    - inform any person who makes inquiries regarding the security that it has been seized, and
    - pay to the sheriff any dividend or other payment the issuer would otherwise pay to the enforcement debtor.
  - Where notice of seizure has been served on an intermediary, the intermediary must
    - hold and deal with the security inaccordance with the sheriff's directions, and
    - divert to the sheriff any dividends or other payments in respect of the security that the intermediary would otherwise be required to pay to the enforcement debtor.
  - Sheriff is entitled to make any election that the enforcement debtor would otherwise be entitled to make regarding dividends or other payments in respect of a seized security.
  - Sheriff is entitled to any information or documents to which the enforcement debtor is entitled as a security holder, either from the issuer or an intermediary, on the same terms as the debtor is entitled to it.
  - Issuer or intermediary is liable to enforcement creditors for any loss suffered by them as a result of breach of the issuer's or intermediary's duties.
- **LIQUIDATION OF PUBLICLY TRADED SECURITIES**
  - Sheriff may sell or otherwise liquidate seized security using normal market mechanisms.
  - Where the enforcement debtor would normally have to endorse a security certificate or other document to dispose of a seize security, the sheriff is empowered to do so.

SPECIAL SEIZURE MECHANISMS

ENFORCEMENT AGAINST SECURITIES

LIQUIDATION OF PUBLICALY TRADED SECURITIES

- In the case of a lost or stolen security certificate, the court may permit the sheriff to transfer the security without the certificate if the issuer is adequately protected against adverse claims.

LIQUIDATION OF NON-PUBLICLY TRADED SHARES

- Except as indicated below, restrictions on share transfer do not apply to a sale of seized shares by a sheriff.
- Sheriff is required to notify the issuer and other shareholders of the proposed procedure for selling seized shares.
- Sale procedure proposed by the sheriff must
    - conform as closely as possible to the procedure the enforcement debtor would have to follow in order to dispose of the shares, and
    - give the issuer and existing shareholders a reasonable opportunity to acquire shares before they are offered to strangers.
- Sheriff is not required to follow a procedure that would have the effect of preventing the shares from being sold, or prevent the shares from being sold for a reasonable price.
- Issuer and other shareholders have the right to "redeem" the seized share by paying the enforcement debt.
- Sheriff or any interested person may apply to the court for an order approving or rejecting any procedure that has been proposed for liquidating the seized shares, or suspending the sale proceedings.

- SPECIAL SEIZURE MECHANISMS
  - **ENFORCEMENT AGAINST ENFORCEMENT DEBTOR'S INTEREST AS A SECURED CREDITOR**
    - **METHOD OF ENFORCEMENT**
      - Where the security is land, enforcement should begin with registration of a notice against the title to the land.
      - Where the security is personal property, the sheriff registers a financing statement in respect of the enforcement procedure in the PPR, and serves notice of seizure on the enforcement debtor.
    - **REALIZATION**
      - Payments due on the secured obligation must be made to the sheriff if the person who owes that obligation has been given notice of the seizure.
      - Sheriff may enforce the security in the same manner as the enforcement debtor could have enforced it.
      - Sheriff may sell the secured obligation using the normal sale procedure for seized property.

CHAPTER 6 - LAND

LAND

- **EXIGIBILITY OF INTERESTS IN LAND**
  - All interests in land should be exigible unless deliberately exempted.
  - In particular, an enforcement debtor's joint interest in land should be exigible.
- **ENFORCEMENT AGAINST INTERESTS IN REGISTERED LAND**
  - **HOW LAND IS BOUND**
    - Debtor's interest in registered land is bound by recording the writ of enforcement on the relevant certificate of title.
    - The binding effect of the writ on the debtor's joint interest in land is subject to the right of survivorship.
  - **SALE OF LAND**
    - No requirement of a nulla bona return before an enforcement debtor's land can be sold.
    - Sheriff issues a notice of sale upon receiving instructions from an enforcement creditor.
      - Instructions include creditor's suggested method of sale.
      - Notice of sale describes the method of sale the sheriff intends to use (which is not necessarily the one proposed by the creditor).
    - Notice of sale is
      - recorded on the certificate of title to the relevant land;
      - served on the enforcement debtor and other parties who have interests recorded on title;
      - entered in the enforcement registry.

LAND

ENFORCEMENT AGAINST INTERESTS IN REGISTERED LAND

SALE OF LAND

- Sheriff may proceed with sale of the land six months after the notice of sale is served on all parties.
  - Six-month period may be enlarged or abridged by the court.
  - During the six-month period, any party upon whom the notice of sale has been served may apply to the court to contest the method of sale proposed by the sheriff.
  - During the six months, the debtor may apply to establish any exemption that would prevent or otherwise affect the sale or the proceeds of sale.
- *COMPLETION OF SALE*
  - When a buyer is found, the sheriff serves notice of the terms of the proposed sale on everyone who was served with the notice of sale.
  - Any interested person has 14 days within which to apply to the court to prevent conclusion of the sale as proposed by the sheriff. Otherwise, no application to the court is necessary for confirmation of the sale.
  - If an application is made, the court may confirm the sale or order that it not be concluded.
- Dower consent is not required for the sale of a Dower Act homestead, and the contingent life interest created by that Act does not survive an enforcement sale.

ENFORCEMENT PROCESS AGAINST UNREGISTERED INTERESTS IN LAND

- No distinction is made in the sale process for recorded or unrecorded interests in land that is registered under the Land Titles Act.
- In the rare case of enforcement proceedings against interests in land that is not registered under the Land Titles Act, the enforcement creditor may apply to the court for any necessary directions regarding the procedure for selling the interest.

CHAPTER 7 - GARNISHMENT

GARNISHMENT

- GENERAL MECHANICS OF GARNISHMENT
  - Present functions of the clerk of the court transferred to the sheriff's office.
  - The garnishment procedure is transferred from the Rules of Court to the statute.
  - An enforcement creditor is entitled to issue a garnishee summons without a court order but must still file an affidavit. The garnishee is required to state the enforcement debtor's last known address when responding to the garnishee summons. This will facilitate service of the garnishee summons and the garnishee's reply on the debtor.
  - Garnishee's compensation is to be set by regulation.
- GARNISHMENT OF JOINT DEBTS
  - Debts owed to debtor and another person are subject to garnishment.
  - Protections for the non-debtor joint obligee:
    - unless it is otherwise ordered, the garnishee is to assume that the beneficial interests of the various joint obligees are equal;
    - garnishee must notify the non-debtor joint obligee of the garnishment;
    - after payment of the enforcement debtor's assumed share to the sheriff, the enforcement debtor and the other joint obligee have the opportunity to establish that the presumption of equal shares is inaccurate;
    - further garnishment of the same joint debt is prohibited, except by leave of the court, until 30 days after service of notice of the garnishment on the non-debtor joint obligee.

GARNISHMENT OF FUTURE OBLIGATIONS

- Where an existing legal relationship (such as a contract) may impose an obligation on a third party to pay money to an enforcement debtor in the future, this future obligation is subject to garnishment.
    - Future balances in deposit accounts are not subject to garnishment.
    - A debtor's potential recovery from a cause of action, including a cause of action for personal injury, is garnishable.
- The mechanics of the process for attaching future obligations is as similar as possible to that for attaching present obligations. For example, there is only one form of garnishee summons.
- "Continuing" garnishee summons expires after one year, but its effect may be continued by serving a replacement garnishee summons.
- ***GARNISHEE'S RESPONSE***
    - Garnishee must file a response that either acknowledges or disputes the existence of the legal relationship referred to in the garnishee summons.
    - If the garnishee acknowledges the relationship, the response must also indicate when the future entitlement is likely to become payable, and the nature of any contingencies that must be met before it will become payable.
    - The garnishee summons remains in force notwithstanding that the garnishee denies the legal relationship. Where the garnishee fails to respond as required, the garnishee may apply for judgment or other appropriate relief.

GARNISHMENT

- GARNISHMENT OF FUTURE OBLIGATIONS
  - *OPERATIONAL DETAILS OF CONTINUING ATTACHMENT*
    - The garnishee should be notified of any change in the amount attached because of changes in the amount owing on subsisting writs of enforcement.
    - Where the enforcement debtor must incur expenses to preserve or maintain the source of a future obligation that has been attached, the court may exempt a portion of the obligation from attachment.
    - Garnishee is entitled to set-off debts owed by the enforcement debtor to the garnishee, if they arose under a commitment entered into before service of the garnishee summons, or if it would be inequitable for some other reason to deny the set-off.
    - Where the attached future obligation arises out of a cause of action that the enforcement debtor is alleged to have against the garnishee, and the garnishee's potential liability is covered by a policy of liability insurance, the garnishee can require the insurer to pay any insurance proceeds to the sheriff instead of to the enforcement debtor.
    - Garnishee may pay money into court in any litigation relating to an attached future obligation, but must give notice of the garnishment proceedings to the clerk of the court at the time of payment in.
    - If the payment in is accepted by the plaintiff/enforcement debtor, the clerk pays the money (or an appropriate portion of it) to the sheriff, rather than to the plaintiff/enforcement debtor.

GARNISHMENT

GARNISHMENT OF CONDITIONAL DEBTS

- Statutory list of conditions that are deemed not to prevent attachment of a deposit account.
- In addition, the court has a discretion to waive or modify any condition affecting an attached obligation, where this can be accomplished without causing prejudice to the garnishee, the enforcement debtor or anyone else.

GARNISHMENT OF EMPLOYMENT EARNINGS

- Garnishment of employment earnings (salary and wages) is retained.
- Garnishment proceedings against an employee cannot serve as grounds for dismissal.
- Garnishee summons is not effective against earnings for current pay period unless it is served at least 10 days before the end of the period, or at least five days before the end of the pay period if the pay period is 10 days or less.

GARNISHMENT OF FUNDS IN COURT

- Garnishment replaces the stop order and applications under section 7 of the Execution Creditors Act for attachment of funds in court.

CHAPTER 8 - COURT-ORDERED ENFORCEMENT

COURT-ORDERED ENFORCEMENT

- **RECEIVERSHIP**
  - Though other reforms will reduce the situations where receivership might be needed, the remedy continues to be available where no other remedy is available or where the available remedy cannot be used effectively.
  - Equitable receivership continues to be a court-ordered remedy. The court must tailor the remedy to suit the circumstances of the case in which it will be used.
  - Existing rules governing exercise of discretion are largely abandoned. The only surviving rule is that there must be some benefit to be obtained by appointing a receiver and the appoint ment must be just and convenient.
  - In determining whether appointment is just and convenient court might consider:
    - amount of the enforcement debt;
    - amount likely to be obtained by receiver;
    - probable costs of the receivership;
    - whether receivership would unreasonably inconvenience or prejudice the debtor or third parties;
    - whether other enforcement processes provide adequate means of reaching the asset;
    - availability of other assets that can be reached by other processes;
    - amount of outstanding writs against the debtor; and
    - whether there is anything the receiver could do that the sheriff enforcing the writ could not.

COURT-ORDERED ENFORCEMENT

- **RECEIVERSHIP**
  - Receivership ordered only in respect of specific assets, not assets generally.
  - Competent and willing person to be appointed.
    - Integrity must be warranted.
    - Sheriff might be appropriate receiver in some cases.
  - Powers and duties of receiver established by court order and by a non-exhaustive list in the statute.
- **COURT-FASHIONED ENFORCEMENT PROCESS**
  - Court has power to give directions for enforcement against a specific asset when the standard enforcement processes are not suitable.
    - Appointing a receiver not necessarily part of the order.
    - Order should ensure the protection of all interests that require protection.
- **IN PERSONAM REMEDY**
  - Court may make in personam order requiring debtor, if it is within his power, to:
    - deliver up any asset;
    - take any steps possible to make asset available for enforcement;
    - effect liquidation of an asset;
    - effect completion of a sheriff's sale of an asset.
  - Order should be made where the sheriff has been unable to enforce against a specific asset of the debtor owing to the interference of the debtor or some other person.

COURT-ORDERED ENFORCEMENT

- THE CHARGING ORDER
  - Charging order under Judgments Act, 1838 is redundant to enforcement procedures developed since or recommended in this report and is abolished.
  - Charging order procedure established in the Partnership Act is abolished and replaced by a receivership procedure that accomplishes the same purpose and gives the same protection to the other partners.
- SEQUESTRATION
  - The contexts in which sequestration is contemplated in our law do not relate to enforcement of judgments.
  - Any enforcement use of sequestration would be redundant to existing remedies or ones proposed in this report.

CHAPTER 9 - EXEMPTIONS

EXEMPTIONS

- POLICY OF EXEMPTIONS
  - To protect debtors' ability to maintain themselves and their families.
  - To protect a measure of security that debtors' ability to maintain themselves and their families will continue in the future.
  - To foster restoration of a debtor's personal economy.
- STRUCTURE OF EXEMPTIONS PROVISIONS
  - Protection of property required to meet basic necessities such as food, clothing and shelter.
  - Protection of property required by debtor to earn a livelihood.
  - Protection of a portion of the debtor's income from employment.
- PROBLEMS WITH PRESENT EXEMPTIONS PROVISIONS
  - **OBSOLESCENCE OVER TIME**
    - Specifically listed exempt property no longer in general use.
    - Provisions concentrate on activities no longer engaged in by majority of population: eg, agriculture.
    - Monetary limits on exemptions rendered obsolete by inflation.
  - **COPING WITH OBSOLESCENCE**
    - Exemptions described generally.
    - Quantity limits established by reference to time where possible.
    - Regular review and adjustment of monetary limits.

EXEMPTIONS

PROBLEMS WITH PRESENT EXEMPTIONS PROVISIONS

COPING WITH OBSOLESCENCE

The Lieutenant Governor in Council should examine the monetary limits for specific exemptions and the minimum wage exemption at least every 3 years and adjust them, if necessary, for inflation.

BASIC NECESSITIES

FOOD

Exemption for such food and products from which food can be made as is sufficient to provide for the reasonable needs of the debtor and dependants for the next 12 months.

CLOTHING

Exemption for the necessary clothing of the debtor and dependants.

SHELTER

PRESENT SHELTER EXEMPTION:

- Rural homestead - quarter section actually occupied.
- Urban "homestead" - house actually occupied - to value of $40,000.
- Mobile Home - mobile home actually occupied - to value of $20,000.

PROPOSED SHELTER EXEMPTION

Rural shelter exemptions should continue as it is except, it should apply only to debtors who gain the primary portion of their livelihood from farming the land on which the shelter is located. Otherwise the urban exemption should apply.

BASIC NECESSITIES

SHELTER

- Urban exemption should continue as it is except:
  - if the debtor's equity exceeds the monetary limit and the house or mobile home is sold, the portion of the proceeds that equals the monetary limit should be exempt from other enforcement processes for 6 months;
  - if the property is co-owned, the exemption should be the portion of the monetary limit that equals the debtor's portion of the total equity;
  - the monetary limit would be reviewed and regularly adjusted in response to inflation.

FURNITURE

- Present exemption should be continued - $4,000 worth of furniture and household appliances, but the monetary limit should be reviewed and regularly adjusted in response to inflation.

MOTOR VEHICLE

- Motor vehicle should be considered a basic necessity for the purposes of exemptions.
- Present exemption of motor vehicle required for earning livelihood should be replaced with exemption of vehicle regardless of reason it is required.
- Monetary limit should be reduced from $8,000 to $5,000.
- Debtor who requires more valuable vehicle for earning livelihood can use the general livelihood exemption to protect such a vehicle.
- Present exemption should also be reformed to provide that if a debtor owns a vehicle worth more than the monetary limit and it is sold, the portion of the proceeds that equals the monetary limit is exempt for 60 days.

EXEMPTIONS

- BASIC NECESSITIES
  - **OTHER BASIC NECESSITIES**
    - Proposed exemption for medical and dental aids and equipment necessary for the debtor and dependants with no monetary limit.
    - Proposed exemption for sentimental memorabilia to a value of $500.
- PROTECTION OF PROPERTY FOR LIVELIHOOD
  - **FARM EXEMPTIONS**
    - ***PRESENT STRUCTURE***
      - Provisions that exempt farm produce sufficient to permit the farm debtor to pay current and immediately foreseeable operational debts and taxes.
      - Provisions that exempt specific property required for the carrying out of farm operations in the immediate future, including animals, equipment, and seed grain.
      - Provisions that exempt specific property required for the continuing farm operation, beyond the immediate future, including a tractor, a motor vehicle, and 160 acres of land.
    - ***PROPOSED STRUCTURE***
      - The present farm exemption structure should be continued, except it should not be the central focus of the exemptions legislation;

EXEMPTIONS

- PROTECTION OF PROPERTY FOR LIVELIHOOD
  - **GENERAL LIVELIHOOD EXEMPTIONS**
    - Present livelihood exemptions:
      - A tractor if required in the debtor's trade or calling.
      - An automobile (up to $8,000) if required in the debtor's trade or calling.
      - Books of a professional person.
      - Necessary tools, implements and equipment used by the debtor in his trade or profession (up to $7,500).
    - Propose that all of these specific livelihood exemptions be replaced by one general livelihood exemption of personal property required in debtor's occupation, to a maximum of $10,000, which should be reviewed and adjusted periodically for inflation.
- PROTECTION OF INCOME
  - **ALTERNATIVES AND PROPOSAL**
    - Prescribed amounts: legislation sets amount of exemption.
    - Discretionary amount: determined by court on a case by case basis.
    - Percentage exemption: legislation establishes the percentage of a debtor's income that will be exempt.
    - Propose adoption of percentage exemption, with minimum and maximum.

EXEMPTIONS

PROTECTION OF INCOME

DETAILS OF PROPOSAL

- Percentage exemption should be calculated on debtor's income net of statutory deductions.
- Exemption should be subject to a minimum monthly exemption of $800 for a debtor without dependants.
  - Increased according to a formula where the debtor has dependants.
- Exemption percentage should be 50% of the debtor's wages in excess of the minimum exemption.
- Exemption should be subject to a maximum monthly exemption of triple the amount of the minimum exemption for the debtor.
- If debtor employed for only part of month, should be entitled to the fullmonthly exemption.
- Garnishee should be provided with a straight-forward "return" form with which to calculate the exemption.

Income exemption should apply to income from employment only. It should not apply to income from property.

PROTECTION OF FUTURE SECURITY

The Government should establish a policy as to the exemption from enforcement of future income security plans and should review the present policy with respect to the exemption of insurance contracts from enforcement.

EXEMPTIONS

- **EXCEPTIONS TO EXEMPTIONS**
  - **EXCEPTIONS FOR CLASSES OF DEBTORS**
    - ***ABSCONDING DEBTORS***
      - The denial of exemptions to debtors who have absconded or are about to abscond should be abolished.
      - However, exemptions should not apply to property that a debtor has abandoned.
    - ***CRIMINAL DEBTORS***
      - Exemptions should not apply to debts arising from criminal activity.
    - ***CORPORATIONS AND PARTNERSHIPS***
      - Exemptions should not be available to corporations or partnerships.
  - **EXCEPTIONS FOR CLASSES OF CREDITORS**
    - ***ALIMONY CREDITOR***
      - Exemptions should not apply to the enforcement of maintenance judgments and orders except
        - wages should be subject to the exemption set out in the Maintenance Enforcement Act whether or not that Act is invoked.
    - ***ROOM AND BOARD CREDITOR***
      - The exception to wage garnishment exemptions for debts contracted for board and lodging would be abolished.

EXEMPTIONS

EXEMPTIONS TO EXEMPTIONS

EXEMPTIONS FOR CLASSES OF CREDITORS

- *CREDITOR FOR PRICE OF EXEMPT PROPERTY*
  - The exemption provisions should apply to the enforcement of a judgment for the price of the exempt property. The present exception in that regard should be abolished.
- *HOSPITAL CREDITORS*
  - The limited exception created by s. 8 of the Exemptions Act for hospital creditors should be abolished.
- *CROWN CREDITORS*
  - There should be no exception for the Crown. It should be bound by the exemptions legislation.

OPERATIONAL ISSUES

- Exemptions should exist as of right.
  - The creditor should be obliged to give the debtor notice that the subject of exemptions will be dealt with at the removal and sale application.
  - At the application, the fact of seizure should give rise to a presumption that the property is not exempt, and evidentiary onus should shift to the debtor.
  - Exception for the shelter exemption:
    - Land against which enforcement proceedings are taken should be presumed not to be exempt unless the debtor takes steps to claim the exemption.
- Exemptions should not be waivable by the debtor.
- The circumstances at the time the issue of exemption is being determined should be the relevant circumstances.

EXEMPTIONS

OPERATIONAL ISSUES

- Where a debtor is paid the exempt portion of the proceeds of sale of property of a type that would have been exempt but for a monetary limit, the proceeds should be exempt from further enforcement processes for 60 days unless the funds are mixed with other funds.
    - In the case of land, the exemption should last for 6 months.
- Exemptions should continue to apply to claims against the estate of a deceased person regardless of whether the judgment was obtained before or after the debtor died.
- The debtor should have the right to choose the exempt property in an exempt class, but if he or she refuses or fails to do so, the sheriff's officer should make the selection.
- The sheriff should be instructed by the reformed legislation not to seize property that appears to be exempt, as in s. 7 of the present Act.
- The creditor should continue to have the right to apply for an order declaring any specific property of the debtor not exempt from enforcement.
- The sheriff should continue to be required to refer any matter of dispute to the Court.
- The provision of the present Act dealing with exemption from distress should be removed to the appropriate statute.

CHAPTER 10 - DISTRIBUTION OF PROCEEDS

DISTRIBUTION OF PROCEEDS

- THE SHARING PRINCIPLE
  - **ALTERNATIVE METHODS OF DISTRIBUTION**
    - Common law priority system: first come first served proceeds of enforcement paid to creditors in the order in which they filed writs of execution with the sheriff.
    - Sharing: proceeds of enforcement paid to all creditors who have writs filed with the sheriff pari passu.
  - **SHARING VERSUS FIRST COME FIRST SERVED**
    - Physical limitations to sharing:
      - first come first served appropriate where the commodity being distributed is incapable of being divided;
      - enforcement proceeds are capable of being divided and there are no circumstances that make this impractical.
    - Ranking the merit of claims:
      - first come first served appropriate where there is greater merit to the claim of the first to come;
      - no greater merit to the claim of the first creditor to file a writ with the sheriff.
    - Reward of diligence:
      - first come first served rewards diligence;
      - sharing may discourage diligence.
        - Under present system, only the proceeds of enforcement are shared. The burden of enforcement is carried by one creditor.
        - This is a deficiency in the legislative implementation of sharing - not indictment of sharing itself.

DISTRIBUTION OF PROCEEDS

THE SHARING PRINCIPLE

SHARING VERSUS FIRST COME FIRST SERVES

- Sharing not as acceptable to creditors:
  - no evidence of this in Alberta.
- Sharing more administratively demanding:
  - true, but the administrative machinery has been developed and has been in operation for many decades.
- Sharing is already used in insolvency legislation:
  - it is none the less appropriate for the enforcement system as well.
- Conclusion:
  - the sharing principle should be retained.

APPLICATION OF THE SHARING PRINCIPLE

WHAT FUNDS ARE SHARED?

- All monies that come into a sheriff's hands because of the existence of a writ of enforcement, regardless of the process by which the money was raised, should be distributed amongst enforcement creditors according to the sharing principle.
- The sharing principle should not apply to payments made directly to an execution creditor by an execution debtor or some other party.

WHO SHOULD SHARE?

- Only creditors with subsisting writs of enforcement participate.
  - Writ is subsisting if delivered to the sheriff or renewed within the year preceding the distribution.

DISTRIBUTION OF PROCEEDS

APPLICATION OF THE SHARING PRINCIPLE

WHO SHOULD SHARE

- Province-wide sharing.
  - Present limitation to creditors who have subsisting writs filed with the sheriff making the distribution should be abolished.
- Certificate procedure is abolished.
  - The summary procedure by which a creditor without judgment can be admitted to the sharing group is not presently used probably because it does not and cannot have any significant advantage over the ordinary procedure. It should be abolished.
- Grace period is established.
  - The 14 day grace period during which creditors without judgment can get judgment and join the sharing group should be abolished, because 14 days after receipt of a distributable fund is no less of an arbitrary deadline than the day the fund is received.
- Reserved share provision is abolished.
  - The provision that contemplates a judge ordering the sheriff to levy in respect of a claim that a debtor has disputed and to hold a "reserved share" of the proceeds for the creditor until the claim has been reduced to judgment should be abolished.
- Crown's priority is abolished.
  - The sharing principle should apply to the Crown where the Crown debt does not have priority by virtue of statute or Crown prerogative.

DISTRIBUTION OF PROCEEDS

APPLICATION OF THE SHARING PRINCIPLE

HOW CAN THE BURDEN OF ENFORCEMENT BE SHARED?

- Creditor who instructs and directs the enforcement process that produces the distributable fund should recover the taxable costs of the successful enforcement process and 15% of the remaining proceeds (up to the amount of the creditor's claim) as a preferred payment.
  - The present priority for the entire costs of the successful creditor should be abolished.
  - Distributive shares calculated after the costs and preferred payment have been deducted from the distributable fund.

PRIORITIES

- The distribution legislation should not include any priority provisions for particular classes of creditors. Priorities should be established by statutes dealing with the subject matter in respect of which the priority arises.

APPLICATION TO ENFORCEMENT AGAINST LAND

- Sharing principle should be applied to distribution of proceeds of sale of land under a writ of enforcement.

INTERVENING ENCUMBRANCES

- An intervening encumbrance on property that is sold in enforcement proceedings should be subordinate only to those writs that were on title before the encumbrance was registered.
- As between enforcement creditors, the sharing principle should apply notwithstanding the presence of an intervening encumbrance.
- Where "partially exempt" property that is subject to an intervening encumbrance is sold, the amount otherwise payable to the enforcement debtor as exempt proceeds should be reduced by the amount paid out of the proceeds on the intervening encumbrance.

DISTRIBUTION OF PROCEEDS

APPLICATION OF THE SHARING PRINCIPLE

OFF-TITLE WRITS

In the distribution of enforcement proceeds, no distinction should be made between writs that bound the property (whether land or personal property) that is the source of the proceeds and writs that did not.

DISTRIBUTION OF SURPLUS FROM ENFORCEMENT OF PRIOR SECURITY INTERESTS

A surplus resulting from the enforcement of a security interest in any property bound by a writ should be paid to (or retained by) the sheriff, who should then distribute the funds in the same manner as funds realized through enforcement proceedings, taking into account any exemptions to which the enforcement debtor is entitled.

CHAPTER 11 - COMPENSATION FOR LOSS

COMPENSATION FOR LOSS

- **ASSURANCE FUND**
  - Funded by levy on enforcement creditors imposed at time writs registered in Enforcement Registry.
  - Amount of levy based on amount of writ: three-tiered structure.
  - Exclusive source of compensation for pecuniary loss suffered as a result of mishaps in the enforcement process.
- **COMPENSABLE LOSS**
  - Subject to court's power to award exemplary damages, no person should have any cause of action in respect of a mishap in the enforcement process that does not cause actual pecuniary loss.
  - Third persons should be entitled to compensation for any pecuniary loss caused by interference or dealing with their property in the course of enforcement proceedings.
    - Third persons who receive notice from the sheriff that property in which they may have an interest has been seized should be required to assert a claim to the property within a specified period, or lose any claim for compensation to which they might otherwise be entitled.
  - Enforcement debtors who suffer pecuniary loss as a result of non-compliance with the statute should be entitled to compensation from the fund.
  - Enforcement creditors who suffer pecuniary loss as a result of negligence within the sheriff's office should be entitled to compensation from the fund.

COMPENSATION FOR LOSS

INDEMNIFICATION OF ASSURANCE FUND

A person whose negligence or deliberate misconduct is the cause of a loss for which the assurance fund is liable should be required to indemnify the fund.

The instructing creditor should not in general be required to provide security for potential obligation to indemnify the assurance fund.

JUDICIAL DISCRETION

Judges should be given discretion to override liability rules to take special circumstances into account.

Volume

2

ENFORCEMENT OF MONEY JUDGMENTS

VOLUME 2

ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

ENFORCEMENT OF MONEY JUDGMENTS

VOLUME 2

Report No. 61

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ENFORCEMENT OF MONEY JUDGMENTS

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ALBERTA LAW REFORM INSTITUTE

The Alberta Law Reform Institute was established on January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding of the Institute's operations is provided by the Government of Alberta, the University of Alberta and the Alberta Law Foundation.

The Institute's office is at 402 Law Centre, University of Alberta, Edmonton, Alberta, T6G 2H5. Its telephone number is (403) 492-5291; fax (403) 492-1790.

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ENFORCEMENT OF MONEY JUDGMENTS

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REMEDIES FOR UNSECURED CREDITORS

VOLUME 2

MODEL JUDGMENT ENFORCEMENT ACT

PURPOSE OF THE MODEL JUDGMENT ENFORCEMENT ACT

The model *Judgment Enforcement Act* ("*JEA*") set out in this volume gives statutory expression to the recommendations in Volume 1, as well as the recommendations in Report No. 50, *Prejudgment Remedies for Unsecured Claimants*. We have drafted and published the model *JEA* with several objectives in mind.

Testing our proposals

Criticism of legislative drafting is a sport in which lawyers, judges, and sundry other commentators often and avidly participate. We suspect that over the years, much of the criticism levelled at legislative drafters could have been more accurately levelled at the principle or proposal that the drafter was directed to put into statutory language. Sometimes, a proposal for legislative action that at first glance seems quite simple and straightforward cannot be implemented except through legislative provisions that are anything but simple and straight forward.

Thus, at a relatively early stage of this project, we decided that putting our emerging proposals into statutory form would be a useful exercise, if only to test the susceptibility of these proposals to being "statutized." The drafting of the model *JEA* was done concurrently with the drafting of the report and recommendations. Indeed, quite a few proposed recommendations were substantially modified or changed altogether in the light of problems or complications that became evident in the course of drafting the model *JEA*.

The result of this interplay between the drafting of the Report proper and the model *JEA* is that we are confident that all of our proposals can be successfully reduced to statutory form, because we have done so. Admittedly the model *JEA* is long and some of its provisions are fairly complex. However, we do not think that either its length or complexity is disproportionate to the breadth or complexities of the subject covered.

Advancing the implementation of our proposals

Drafting from scratch the legislation necessary to implement the proposals in Volume 1 would be a very time-consuming task for legislative counsel. If our proposed reforms are favourably received by the government, the model *JEA* should considerably reduce the effort and time required of legislative counsel in order to draft the necessary legislation. We are not so bold as to claim that the model Act is perfect in all respects, or that it deals with every single issue that would have to be addressed by an actual Act. But we do think that the model Act addresses very nearly all the issues that would have to be addressed, and that it does so in a clear, coherent and reasonably concise manner. In short, we believe that the model *JEA* would indeed be a useful model for legislation implementing our proposals.

Filling in details of proposals

Although Volume 1 is hefty and its recommendations numerous, it does not purport to address in detail every issue that will arise in connection with the proposed enforcement system. This reflects a decision that the discussion and recommendations in Volume 1 should describe all the major features of the proposed enforcement system, without necessarily smothering the reader in detail. Thus, readers who want a general description of the proposed system and some of its more important details can find them in Volume 1. Readers who want to wrestle with all the details of the proposed system will want to look at the model *JEA*.

In truth the *JEA* does not provide every last detail of the proposed system. It does leave some details to be dealt with by regulation. However, we have tried to make the *JEA* as complete and self-contained as reasonably possible. We do not think that many readers will criticize the *JEA* on the basis that it leaves too much to be dealt with by regulation.

Provoking comment

This volume is part of a "final report", which contains our considered recommendations for reform. But this does not mean that we think all of our readers will agree that every detail of every single one of our proposals is the embodiment of perfection. Indeed, we would be surprised and disappointed if some of our proposals do not generate constructive criticism. One of our purposes in publishing the model *JEA* is to encourage and facilitate discussion and debate concerning our proposals.

We suspect that for various reasons, many lawyers and other readers of our reports prefer to discuss and criticize reform proposals in the form of a draft Act, rather than in the form of a list of recommendations. This may simply be a matter of being accustomed to scrutinizing and criticizing statutes on a daily basis. Another explanation may be that a detailed draft statute seems more concrete and real than does a list of recommendations. In any event, we publish the model *JEA* in the hope it will encourage discussion and criticism of our proposals.

GUIDE TO VOLUME 2

The focal point of this volume is the model *Judgment Enforcement Act*, with its accompanying comments. There are also four appendices. The appendices contain material to which readers may find it useful to refer in conjunction with the model Act and comments. The following observation provide a brief introduction and guide to the *JEA* and each of the appendices.

Model Act with Comments

Drafting Style

Since we intend the *JEA* to serve as a model for actual legislation based on our proposals, it is drafted in accordance with the stylistic conventions that currently govern legislative drafters in Alberta. This applies to everything from the general layout of the Act to such mundane matters as the numbering of provisions, the use and placement of definitions, and punctuation.

Relationship between *JEA* and Recommendations

As already noted, the *JEA* is primarily based on the recommendations in Volume 1, but goes into much more detail than do the recommendations. The model Act is also organized differently than the report, in terms of the order in which it addresses various subjects. Consequently, readers should not be surprised to find that the provisions of the model Act often take on a very different appearance than the recommendations upon which they are based. In short, the model Act pays more attention to the substance of the recommendations than to their form.

Defined Terms

Any term that is defined in the Act is italicized whenever it appears. Most of the definitions appear in section 1. However, some terms are defined only for the purposes of a particular part, or even a particular section or group of sections, in which case the definition appears there.

Transitional and Consequential Provisions

Obviously, the implementation of our proposals would require a transitional period, and the implementing Act would require transitional provisions. The Act would also have to deal with the amendment or outright repeal of a considerable body of existing legislation. We considered including such provisions in the model *JEA*, but ultimately decided that the purposes of the model Act would not be greatly advanced by including them. What we have done, in Appendix D, is provide a summary of changes that would be required to existing legislation.

Comments

The comments accompanying the model are quite brief, in many cases consisting of nothing more than a reference to a recommendation or section number in an existing act. Part of the explanation for the brevity of the comments is our decision to keep them brief enough to be printed on pages directly opposite the pages on which the relevant provisions of the Act appear. We believe that reference back and forth between provisions of the Act and relevant comments will be made easier by printing them across from each other. Moreover, this method prevents the text of the Act from getting lost in the comments.

Another reason for the brevity of the comments is that we have tried to stay away from using the comments to justify the policy behind the provisions of the Act. That is the office of Volume 1. The first purpose of the comments is to indicate the derivation of the various sections of the *JEA*, by providing cross-references to the relevant recommendations and existing legislation. These cross-references appear in the first (and sometimes only) comment for each section of the *JEA*.

The second purpose of the comments is to describe the purpose or operation of the various provisions, where this may not be self-evident. This is done by a combination of explanations, references to other provisions of the Act, and hypothetical examples, as may be appropriate. The amount of this expository material varies from section to section, depending upon such factors as the complexity of the subject matter covered, and whether the provision in question represents a marked departure from the existing law.

Part 2 of the *JEA* is concerned with prejudgment remedies. That subject was dealt with in our Report No. 50, *Prejudgment Remedies for Unsecured Claimants*. Thus, references to recommendation numbers in the comments for Part 2 are preceded by "PJR", to remind readers that the relevant recommendations come from Report No. 50, rather than Volume 1 of this report. However, those recommendations are reprinted in Appendix A.

Appendix A: Recommendations

Appendix A is has two parts. The first part sets out the recommendations from Volume 1 of this report. The second part reprints the recommendations made in Report No. 50, *Prejudgment Remedies for Unsecured Claimants*. Recommendations in the latter report form the basis of Part 2 of the model Act.

Appendix B: Existing Legislation

Appendix B sets out the complete text of three acts: the *Execution Creditors Act*, the *Exemptions Act*, and the *Seizures Act*. It also contains relevant rules from the Alberta Rules of Court.

Appendix C: Tables of Concordance

Most of our readers will probably be quite familiar with existing creditors' remedies legislation, such as the *Seizures Act* and *Execution Creditors Act*, and may be curious to know where, or if, the *JEA* deals with the subject of a particular section of, say, the *Seizures Act*. The Tables of Concordance in Appendix C are designed to provide this information for the three main creditors' remedies acts, as well as the relevant provisions of the *Rules of Court*. The cross-references in these tables are one way. They can be used to find where the subject dealt with by a particular provision of the existing legislation is dealt with by the *JEA*, but not the other way round. The latter sort of information can be found by referring to the comments for any given section of the *JEA*.

It should be emphasized that the purpose of the tables is to indicate where the *subject matter* of a given provision of the existing legislation is dealt with by the *JEA*. It does not indicate that the *JEA* provision is based on the old provision, or even that it deals with the subject matter in the same way as the old provision. The *JEA* provision that "corresponds" to one of the old provisions may take an entirely different approach to the subject matter that they both deal with.

The tables do not attempt to explain the similarities and differences between the old provisions and the corresponding *JEA* provisions. That should be evident from looking at the provisions themselves. What we have done, however, is provide brief explanatory notes regarding some of the existing provisions. For the most part, these are provisions whose subject matter is *not* dealt with by any provision of the *JEA*, and the notes are intended to explain why this is so.

Appendix D: Legislation Requiring Amendment or Repeal

This appendix indicates what provisions of existing legislation would have to be amended or repealed as part of the implementation of the proposals. The appendix does not propose wording for amendments, but indicates the general nature of the amendments required.

JUDGMENT ENFORCEMENT ACT

(WITH COMMENTS)

JUDGMENT ENFORCEMENT ACT

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SCHEDULE A

COMMENTS

LIST OF ABBREVIATIONS

The following abbreviations appear throughout the comments:

Abbreviation	Stands for:
ECA	*Execution Creditors Act*
LTA	*Land Titles Act*
LTO	Land Titles Office
PPR	Personal Property Registry
PPSA	*Personal Property Security Act*
JEA	(model) Judgment Enforcement Act

The following abbreviations are used in certain examples in the comments:

Abbreviation	Stands for:
C	an enforcement creditor
D	an enforcement debtor
G	a garnishee
T	a third person who is affected by enforcement proceedings

Section 1(1)

(a): "agricultural products"

This definition is similar to the definition of "farm products" in s. 481.110 of the *California Code of Civil Procedure*, Title 6.5 (Attachment), which is in turn based on s. 9-109(3) of the *Uniform Commercial Code*.

(c): "building materials"

This definition is identical to the definition in s. 1(1)(c) of the PPSA. This term makes its only appearance in the definition of "fixture" later in this section.

(d): "chattel paper"

This definition is identical to the definition in s. 1(1)(e) of the PPSA. It appears in the definition of "instrument" in this section, and in s. 45(5), which deals with priority issues.

(e): "clearing agency"

This definition is similar to the definition of this term in National Policy Statement No. 41, "Shareholder Communication" of the Canadian Securities Administrators. S. 46 sets out special priority rules for "market securities" (see definition in this section) traded through a clearing agency. This term also appears in the definition of "intermediary" in s. 87.

MODEL
JUDGMENT ENFORCEMENT ACT

Definitions

1

(1) In this Act,

(a) "agricultural products" includes *crops* or livestock or products of *crops* or livestock in their unmanufactured states, while in the possession of a *person* engaged in raising, fattening, grazing or other agricultural operations;

(b) "assurance fund" means the assurance fund provided for in Part 12;

(c) "building materials" means materials that are incorporated into a building and includes goods attached to a building so that their removal

(i) would necessarily involve the dislocation or destruction of some other part of the building and cause substantial damage to the building, apart from the loss of value of the building resulting from the removal, or

(ii) would result in weakening the structure of the building or exposing the building to weather damage or deterioration,

but does not include heating, air conditioning or conveyancing devices or machinery installed in a building or on land for use in carrying on an activity inside the building or on the land;

(d) "chattel paper" means 1 or more writings that evidence both an *obligation* and a security interest in or lease of specific goods or specific goods and accessions, but does not include a security agreement providing for a security interest in specific goods and after-acquired goods other than accessions;

(e) "clearing agency" means an entity that provides centralized facilities for the clearing of trades in securities, or that provides centralized facilities as a depository in connection with the clearing of trades in securities, and includes a nominee of such an entity;

(f) "Court" means the Court of Queen's Bench;

Section 1(1)

(g): "crops"

This is very similar to the definition of "crops" in s. 1(k) of the PPSA. The only difference is that s. 1(k)(ii) of the PPSA definition is not included here, as it is not considered appropriate for the purposes of the JEA.

(h): "distribute"

This term has a narrow meaning in the JEA. It refers to payments made by sheriffs under one of the two sections referred to by the definition.

(i): "document of title"

This is identical to the definition in s. 1(1)(n) of the PPSA. It appears in s. 45(4) in connection with priority issues.

(j),(k),(l): "enforcement creditor", "enforcement debt", enforcement debtor"

Note the requirement of a **subsisting** writ in each definition. The circumstances in which a writ is considered to be subsisting are set out in
s. 36.

(m): "enforcement proceedings"

Some provisions of the JEA are meant to apply to specific enforcement processes, such as seizure or garnishment, and refer to those processes. However, many provisions are meant to apply generally to all enforcement processes authorized by the JEA, and to any step in any of these enforcement process. Such provisions refer to enforcement proceedings.

(n),(o): "exempt", "exigible"

These two definitions are intended to permit various substantive provisions to refer to "exempt" or "exigible" property, rather than having to refer repeatedly to property that is "exempt from enforcement proceedings under this Act" or that is "subject to enforcement proceedings under this Act". It will be noted that the categories of exigible and exempt property are mutually exclusive.

(p): "fixture"

1. This definition does not purport to solve the problem of determining whether a chattel has become a fixture. That is left to be determined by common law principles. The exclusion of building materials comes from s. 1(1)(r) of the PPSA. The effect of the exclusion of building materials from this definition is that they are treated for all purposes as part of the land.

2. Fixtures receive special attention in two places: s. 44 (in connection with priorities); and s. 105 (seizure).

(g) "crops" means crops, whether matured or otherwise, and whether naturally grown or planted, attached to *land* by roots or forming part of trees or plants attached to *land*, but does not include trees other than

  (i) nursery stock, and

  (ii) trees being grown for use in reforestation of land other than the land on which the trees are growing;

(h) "distribute" means pay out in accordance with sections 170 through 172;

(i) "document of title" means a writing issued by or addressed to a bailee

  (i) that covers goods in the bailee's possession that are identified or are fungible portions of an identified mass, and

  (ii) in which it is stated that the goods in the bailee's possession that are identified in it will be delivered to a named *person*, or to the transferee of the *person*, to bearer or to the order of a named *person*;

(j) "enforcement creditor" means a *person* in whose favour there is a subsisting *writ*;

(k) "enforcement debt" means an amount outstanding on a *money judgment* in respect of which there is a subsisting *writ*;

(l) "enforcement debtor" means a *person* against whom there is a subsisting *writ*;

(m) "enforcement proceedings" means any action, step or measure authorized by this Act to be taken for the purpose of enforcing a *money judgment*;

(n) "exempt" means not subject to *enforcement proceedings*;

(o) "exigible" means subject to *enforcement proceedings*;

(p) "fixture" means a chattel that has been annexed to land and that is regarded in law as part of the land to which it has been annexed, but does not include *building materials*;

Section 1(1)

(q): "instructing creditor"

1. This is one of several terms that is defined so that it can be used as a handy shorthand for a long descriptive phrase. Here, "instructing creditor" will take the place of phrases such as "the creditor who instructed the sheriff to seize".

2. The reference to creditors upon whose instructions proceedings are continued contemplates situations such as where the original instructing creditor instructs the sheriff to release a seizure, and another enforcement creditor instructs the sheriff to continue the seizure: see s. 185(2).

(r): "instrument"

This is identical to the definition in s. 1(1)(u) of the PPSA, except that in clause (iv) the term "security certificate" replaces the PPSA term "security".

(s): "judgment"

This definition does not presume to state the circumstances in which an order, decree, duty or right may be enforced as or in the same manner as a judgment of the court. Generally, the answer will be found in the statute under which the order or decree was made, or the obligation or right arose.

(t): "judgment creditor"

This term appears only a few times in the JEA. Most references are to an "enforcement creditor". The term "judgment creditor" is only used to refer to a creditor who has obtained a money judgment, but does not have a subsisting writ. This might occur because the creditor has not yet caused a writ to be registered in the Enforcement Registry or because registration of the writ has expired.

(u): "land"

1. The classification of property as land or personal property does not affect its exigibility under the JEA; s. 4 provides that all property is exigible unless it is specifically exempted.

2. The distinction between personal property and land is relevant when it comes to the effect of a writ of enforcement. Generally speaking, to bind personal property, a writ must be registered in the PPR. To bind a parcel of land, a writ must be recorded on the title to that land in the appropriate LTO: see s. 39(2)

3. Another difference is in the method of enforcement. The procedure for selling an enforcement debtor's land is somewhat different than the procedure for seizing and selling personal property.

4. Growing crops are excluded from the definition of "land", and thus can be seized and sold as personal property of the debtor. However, a growing crop can be sold in an enforcement sale of the land upon which it is growing: see s. 111. Also, the priority rules acknowledge that for certain purposes the general law may treat growing crops as an interest in land: see s. 44.

(v): "market security"

1. Reference: Recommendation 47.

2. Recommendation 47 refers to publicly-traded securities. The JEA uses the term "market security" simply because it is shorter.

(q) "instructing creditor" means the *enforcement creditor* upon whose instructions certain *enforcement proceedings* are taken or continued;

(r) "instrument" means

  (i) a bill, note or cheque within the meaning of the *Bills of Exchange Act* (Canada).

  (ii) any other writing that evidences a right to the payment of money and is of a kind that in the ordinary course of business is transferred by delivery with any necessary endorsement or assignment, or

  (iii) a letter of credit or an advice of credit if the letter or advice states that it must be surrendered on claiming payment under it,

but does not include

  (iv) *chattel paper*, a *document of title*, a *security certificate*, or

  (v) a writing that provides for or creates a mortgage or charge in respect of an interest in *land* that is specifically identified in the writing;

(s) "judgment" includes any order, decree, duty or right that may be enforced as or in the same manner as a judgment of the court;

(t) "judgment creditor" means a *person* entitled to enforce a *money judgment;*

(u) "land" includes any interest in land, but does not include growing *crops;*

(v) "market security" means

  (i) a share or other ownership interest in a body corporate, partnership, association, organization, trust, or fund

  (ii) an *obligation* of any *person* or entity, including a body corporate, partnership, association, organization, government, trust, or fund or

  (iii) a right to acquire or to sell such an interest or *obligation*

(v): "market security" (continued)

3. To be treated as a market security, an asset must satisfy one of clauses (i), (ii) or (iii) and one of clauses (iv) or (v). The function of the last two clauses is to identify securities that are publicly traded, either on a stock exchange or in the over-the-counter market.

4. It should also be noted that this definition refers to interests, obligations and rights, rather than to documents that may evidence such rights. Where we want to refer to such documents, we use the term "security certificates".

(x): "mobile home"

This is identical to the definition of "mobile home" in s. 24(1) of the *Seizures Act*.

(y): "money judgment"

A judgment might require a defendant both to pay money to do something else. For example, a judgment might order the defendant not to carry on a certain activity and require the defendant to pay a sum of money to the plaintiff. This definition treats the part of the judgment requiring payment of a sum of money as a distinct money judgment; the injunctive aspect of the judgment would fall outside the scope of the JEA.

(z): "obligation"

When the JEA refers to money that is (or may be) owed by some person to an enforcement debtor, it uses the term "obligation", rather than the term "debt". This is done for two reasons: 1) to avoid as far as possible the legal baggage that comes with the term "debt"; and 2) to avoid confusion between the amount owed by the enforcement debtor (the "enforcement debt") and amounts owed to the enforcement debtor ("obligations").

(ee): "property"

1. This inclusive definition is very broad. It is intended to sweep in any asset that an enforcement debtor might own that could conceivably be converted into money in the hands of a sheriff. Many assets will meet two or more of the listed criteria.

2. The main purpose of clause (i) is to make it clear that the JEA disregards the distinction legal theorists often draw between things, and property rights in things. The JEA regards a car (or any other item) as property, not just as the subject matter of property rights. At the same time, the owner's rights in the car are also regarded as property.

3. Clauses (iii) and (iv) are particularly functional in outlook. Clause (iii) proceeds from the premise that if an enforcement debtor has some right or interest that can be transferred for value to a third person, it should be possible to convert that right or interest into money in the hands of a sheriff. Similarly, clause (iv) is based on the premise that a right in an enforcement debtor to be paid money or to receive some other kind of property has the potential to be converted into money in the hands of a sheriff.

that is one or part of a class or series

(iv) listed and posted for trading on a securities exchange, or

(v) for which values or prices routinely appear in published securities market reports or in quotation services used by securities dealers;

(w) "Minister" means the Attorney-General;

(x) "mobile home" means

(i) a vacation trailer or house trailer, or

(ii) a structure, whether ordinarily equipped with wheels or not that is constructed or manufactured to be moved from one point to another by being towed or carried and to provide living accommodation for one or more *persons;*

(y) "money judgment" means a *judgment* requiring a *person* to pay money, or that part of a *judgment* which requires a *person* to pay money;

(z) "obligation" means a legal or equitable duty to pay money;

(aa) "person", except where the context otherwise requires, includes the Crown;

(bb) "personal property" means *property* other than *land;*

(cc) "Personal Property Registry" means the Personal Property Registry established under the *Personal Property Security Act;*

(dd) "private dwelling" includes any building, *mobile home,* room or suite occupied by a *person* as a residence, but does not include the common area of an apartment or similar building;

(ee) "property" includes

(i) things, as well as rights or interests in things,

(ii) anything regarded in law or equity as property, or as an interest in property,

(iii) any right or interest that can be transferred for value from one *person* to another,

(ee): "property" (continued)

4. Causes of action might not fit into a "standard" legal definition of property. However, they are so treated for the purposes of the JEA, because a cause of action has the potential to be converted into money in the hands of a sheriff.

(gg): "security certificate"

1. This definition is the same as the definition of "security" in s. 1(1)(oo) of the PPSA, which is itself almost identical to the definition of that term in s. 44(2)(n) of the *Business Corporations Act*. The defined term is "security certificate", because we want to reserve the term "security" for the rights or obligations that may be evidenced by a security certificate.

2. In Part 6, which deals with the procedure for seizing securities (among other things), the term "security certificate" is defined a little differently: see s. 87(d).

(ii): "sheriff"

The term "sheriff" has an equivocal meaning in legislation such as the *Seizures Act* and the ECA. Depending on the context, a reference to "the sheriff", may be best understood as a reference (a) to the person who bears the title of "Sheriff" within a particular judicial district, (b) a sheriff's officer (eg, an assistant sheriff or bailiff), or (c) the sheriff's office, viewed not as any particular person but as a government office that performs certain functions connected with the enforcement of judgments. As a matter of fact, most references to "the sheriff" make more sense if read as references to the sheriff's office. This definition is intended to recognize all three possible uses of the term. It should be clear from the context which usage is intended in any given provision. See also s. 11, regarding the powers of sheriff's officers.

Section 1(2)

1. Reference: PPSA, s. 1(2).

2. Whether or not a person has knowledge of some fact can be important for the determination of certain liability and priority issues: see ss 29,43,45,46.

(iv) any right, including a contingent right, to be paid money or receive any other kind of property, and

(v) any cause of action;

(ff) "secured obligation" means an *obligation* secured by an interest in *property*;

(gg) "security certificate", except in Part 6, means a writing that is

(i) in bearer, order or registered form,

(ii) of a kind commonly dealt in on securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment,

(iii) one of a class or series or by its terms divisible into a class or series, and

(iv) evidence of a share, participation or other interest in or obligation of the issuer of the writing;

(hh) "seizure documents" means the documents referred to in section 63(2);

(ii) "sheriff" means a sheriff, *sheriff's officer*, or sheriff's office, as the context requires;

(jj) "sheriff's officer" means a *person* duly appointed as such;

(kk) "writ" means a writ of enforcement.

(2) For the purposes of this Act,

(a) an individual knows or has knowledge when information is acquired by him under circumstances in which a reasonable *person* would take cognizance of it;

(b) a partnership has knowledge when information has come to the attention of one of the general partners or a *person* having control or management of the partnership business under circumstances in which a reasonable *person* would take cognizance of it;

(c) a corporation knows or has knowledge when information has come to the attention of

(i) a managing director or officer of the corporation, or

Section 2

1. Reference: Recommendation 143.

2. Subsection (2) is non-committal as to what proceedings might be available to the Crown under its prerogative. The Institute has considerable doubt that the Crown should have it remedies that are not available to other enforcement creditors.

3. If the Crown does use the enforcement mechanisms provided by the JEA, it will be subject to the same rules as any other creditor. It should be noted though, that the distribution rules contemplate that other acts may rank certain enforcement creditors (including, perhaps, the Crown) ahead of other enforcement creditors in a distribution of money in the hands of a sheriff: see s. 172(c).

Section 3

1. Reference: Recommendations 4, 137.

2. Subsection (2) embodies the principle underlying the ECA. It has direct application not only in the distribution of enforcement proceeds among all enforcement creditors of the relevant debtor (Part 11), but also in the provisions, such as s. 182, that allow one enforcement creditor to "take over" enforcement proceedings that are abandoned by the original instructing creditor.

(ii) a senior employee of the corporation or association with responsibility for matters to which the information relates,

under circumstances in which a reasonable *person* would take cognizance of it, or when the information in writing has been delivered to the registered office of the corporation or attorney for service for the corporation;

(d) the members of an association know or have knowledge when information has come to the attention of

(i) a managing director or officer of the association,

(ii) a senior employee of the association with responsibility for matters to which the information relates, or

(iii) all the members

under circumstances in which a reasonable person would take cognizance of it;

(e) the Crown knows or has knowledge when information has come to the attention of a senior employee of the Crown with responsibility for matters to which the information relates under circumstances in which a reasonable person would take cognizance of it.

PART 1

GENERAL

Crown is bound

2

(1) This Act binds the Crown.

(2) Notwithstanding subsection (1), nothing in this Act prevents the Crown from collecting a debt through proceedings otherwise available to the Crown under its prerogative.

Enforcement processes

3

(1) A *money judgment* may be enforced only through proceedings authorized by this or any other Act.

(2) Except as otherwise specifically provided by this or any other Act, all *enforcement proceedings* are deemed to be taken on behalf and for the benefit of all *enforcement creditors* of the *enforcement debtor*.

Section 3 (continued)

3. Subsection (3) follows from Recommendation 137. It is intended to make it clear that enforcement of a judgment is to be distinguished from a (more or less) voluntary payment to the creditor by the debtor. Subsection (3) says nothing about whether a direct payment to one judgment creditor could be attacked by other creditors as a fraudulent preference.

Section 4

1. Reference: Recommendation 1.

2. When read with the definitions of "property" and "exigible" in s. 1, this section says that all of a judgment debtor's assets are subject to enforcement proceedings, except those that are specifically exempted.

Section 5

This section states the principle that underlies various recommendations in Volume 1 of our report and many specific provisions of the JEA. The principle is that the enforcement system is province-wide. The one exception is the requirement in s. 73(2) that applications for removal and sale be made in the judicial district where the seizure took place.

Sections 6-9

1. Reference: Recommendation 9.

2. Section 7 states the general principle that the Enforcement Registry is to contain a complete record of all enforcement activities. However, the exact details of what is to be entered in the Enforcement Registry, and how it is to be recorded, is for the most part left to be prescribed by regulation.

3. The Enforcement Registry will be an electronic data base. One of the issues that s. 9 leaves to be determined by regulation is the extent to which remote access to this data base should be permitted.

(3) Nothing in this section prevents a *judgment creditor* from soliciting or accepting payment from the *judgment* debtor.

All property exigible

4 Except as otherwise expressly provided in this or any other Act, all *property* of an *enforcement debtor* is *exigible*.

Province-wide enforcement

5 Except as otherwise expressly provided, *enforcement proceedings* under this Act shall be carried out without regard to judicial district or other geographical divisions within the Province.

ENFORCEMENT REGISTRY

Enforcement registry

6 A registry called the Enforcement Registry shall be established by the *Minister*.

Contents of enforcement registry

7

(1) The Enforcement Registry is contain a record of all *enforcement proceedings* taken with respect to a *money judgment*.

(2) Except as otherwise provided by this Act,

(a) the particular information or documents to be entered in the Enforcement Registry,

(b) the manner in which information or documents are to be entered, and

(c) the circumstances in which outdated or inaccurate information or documents may be removed from the Enforcement Registry

shall be prescribed by the regulations.

Registrations in enforcement registry

8

(1) A document or information required or permitted to be registered in the Enforcement Registry may be submitted for registration to any *sheriff*.

(2) The *sheriff* to whom a document or information is submitted in accordance with subsection (1) shall promptly register it in the Enforcement Registry.

Public access to enforcement registry

9 The Enforcement Registry shall be open to examination by the public, subject to

(a) payment of the prescribed fee, if any, and

Section 10

1. Reference: Recommendation 25.

2. This section is consistent with sheriffs' offices being organized on the basis of judicial districts or, indeed, on any other basis.

Section 11

1. Reference: Recommendation 42.

2. One object of this section is to dispense with the pretence that the powers of the sheriff are vested in one particular individual, who then delegates this power to his or her subordinates as may be required. Thus, where the JEA gives some power to "the sheriff", it is in fact a grant of power to every sheriff's officer.

3. Recommendation 42 says that the sheriff should be able to obtain "expert assistance" in connection with the sale of seized property. This section generalizes the recommendation to make it clear that a sheriff's officer may obtain assistance or advice to carry out any of his or her responsibilities under the JEA. For example, this section would allow the officer to obtain the services of a real estate agent to sell land, or of a stock broker to sell shares.

Section 12

1. Reference: ECA, s. 4(2)(a).

2. This generalizes the indemnification requirement in the ECA, which applies only to seizure instructions. This section applies to any instructions received by the sheriff. Note, however, that it refers only to payment of the sheriff's fees and expenses. It says nothing about indemnifying the sheriff against liability. That is made unnecessary by the provisions of Part 12, which largely immunize sheriff's officers from liability, and which create an assurance fund to deal with mishaps in the enforcement process.

Section 13

This section assumes that not all the information and documents generated or received by sheriffs will necessarily find their way into the Enforcement Registry. For example, the precise text of a creditor's letter of instructions would almost certainly not be recorded in the Enforcement Registry. However, the letter itself would be retained on the sheriff's file.

Section 14

1. All of the provisions of this Act that require a sheriff to proceed in some particular fashion in given circumstances are intended to protect the interests of some person or class of persons. It is reasonable, therefore, that if all the persons who might be affected by a sheriff's action consent to it, the sheriff should be considered to have taken that action in accordance with the JEA.

2. Section 165 provides that an enforcement debtor cannot agree to waive an exemption.

(b) such reasonable restrictions on the time, place, and mode of access as may be prescribed by regulation.

SHERIFFS

Sheriff's powers exercisable throughout Province

10 A *sheriff* may perform his duties and exercise his powers under this Act anywhere in Alberta.

Sheriff's powers exercisable by sheriff's officers

11 Anything this Act requires or permits a *sheriff* to do may be done without warrant by any *sheriff's officer*, with such assistance or advice, including the paid assistance or advice of professional agents, brokers or advisers, as the officer considers desirable.

Payment of sheriff's fees and expenses

12 A *sheriff* is not required to act on any instruction from an *enforcement creditor* until the creditor has paid the *sheriff's* prescribed fee and reasonably anticipated expenses of carrying out the instruction, or made arrangements for payment that are satisfactory to the *sheriff*.

Sheriff's records

13

(1) Every *sheriff* shall maintain an accurate and complete record of

(a) instructions received from *enforcement creditors*;

(b) steps taken to carry out creditors' instructions, and their results;

(c) notices or statements sent or received;

(d) money received, indicating the source and the date of receipt;

(e) money paid out, indicating the amount paid to each recipient; and

(f) every other matter of which the regulations require the *sheriff* to maintain a record.

(2) Upon payment of the prescribed fee, if any, a *sheriff* shall provide to a *person* who requests it any information of which the *sheriff* is required to maintain a record.

Acting by consent

14 Subject to section 165, but notwithstanding any other provision of this Act, anything done by a *sheriff* with the written consent of all interested *persons* is deemed to have been done in accordance with this Act.

Section 15

1. Reference: Recommendation 5; ECA, s. 39.

2. This serves a similar purpose, but is not identical to s. 39 of the ECA. This section allows any interested person to apply for directions, not only the sheriff. It does not purport to protect a sheriff who acts in accordance with the court's direction from liability. This is unnecessary because any liability will fall on the assurance fund, rather than on individual sheriff's officers: see Part 12.

Section 16

1. The definition of "claim" is based on Recommendation PJR 3. In accordance with this recommendation, a claim need not be in respect of a "liquidated demand". A claim for unliquidated damages would satisfy this definition.

2. The definition of "exigible property" is included out of an abundance of caution. Section 4 says that (except as otherwise provided) all property of an enforcement debtor is exigible. However, the defendant against whom the prejudgment attachment order is sought is not yet an enforcement debtor.

Section 17

1. Reference: Recommendation PJR 4.

2. It will be noted that the criteria set out here are conjunctive: they must all be satisfied before an attachment order can be granted.

Direction by the Court

15 On the application of a *sheriff* or any interested *person,* the *Court* may give such directions as it considers proper regarding the exercise or performance of any of the *sheriff's* powers or duties under this Act, and without restricting the generality of the foregoing, may give directions as to the manner in which the *sheriff* should exercise a discretion given to the *sheriff* by this Act.

PART 2

PREJUDGMENT RELIEF

Definitions

16 In this Part,

(a) "claim" means a claim that, if established, would ground a *money judgment;*

(b) "claimant" means a *person* asserting a *claim;*

(c) "dealing", in reference to *property,* includes transferring, using, disposing of, creating an interest in, or doing anything to the *property;*

(d) "defendant" means a *person* against whom a *claim* is asserted.

(e) "exigible property" means *property* that would be *exigible* if the *defendant* were an *enforcement debtor.*

ATTACHMENT ORDER

Grounds for attachment order

17 The *Court* may grant an attachment order on the application of a *claimant* where

(a) there is a reasonable likelihood that his *claim* against the *defendant* will be established,

(b) there are reasonable grounds for believing that the *defendant* is *dealing* with his *exigible property,* or is likely to do so,

- (i) otherwise than for the purpose of meeting his reasonable and ordinary business or living expenses, and
- (ii) in a manner that would be likely to seriously hinder the *claimant* in the enforcement of a *judgment* against the *defendant,* and

Section 18

1. Reference: Recommendation PJR 11.

2. This section deliberately uses "should" rather than "shall". In effect, it is a statement of a principle that judges should keep in mind when deciding upon the terms of attachment orders.

Section 19

1. Reference: Recommendations PJR 8, 12, 13, 15, 17, 18.

2. This section describes the possible scope of an attachment order, dealing with both the property to which it may apply and the method by which such property may be preserved. It is intended to provide the court with the flexibility to make an order that will be appropriate to the particular circumstances of any given case.

3. In the interest of simplicity, subsection (3) does not preserve the distinction between various methods of attachment that is made by Recommendation PJR 18.

Section 20

Reference: Recommendation PJR 23.

Section 21

1. Reference: Recommendations PJR 6, 24.

2. Subsection (1) permits a claimant who has not yet commenced an action, but who is about to do so, to apply for an attachment order. However, judges will undoubtedly look favourably upon such applications only in the most urgent of circumstances. The usual course would be to make an application for prejudgment relief after an action is commenced.

(c) it would be just and equitable to grant the order.

Minimum inconvenience to defendant

18 An attachment order should cause as little inconvenience to the *defendant* as is consistent with achieving its purpose, and if possible should allow the *defendant* to use attached *property* for proper purposes.

Contents of attachment order

19

(1) An attachment order may

- (a) apply to any *exigible property* of the *defendant*,
- (b) prohibit or regulate any specified *dealings* with the *defendant's exigible property*,
- (c) require the *defendant* or a *person* who has possession or control of *exigible property* of the *defendant* to deliver the *property* up to a *person* identified in the order,
- (d) authorize the *claimant* to issue a garnishee summons, to which Part 8 shall apply with any necessary modifications,
- (e) appoint a receiver, to whom section 155 shall apply with any necessary modifications, and
- (f) include any term, condition or ancillary provision that the *Court* considers necessary or desirable.

(2) An order under subsection (1)(b) may identify the *property* to which it applies, or may provide that it shall apply to *property* to be subsequently identified in writing by a *sheriff*, in which case the writing shall be considered part of the order.

(3) The amount or value of *property* to which an attachment order applies shall not exceed what appears to be necessary to meet the *claimant's claim*, including interest and costs, and any subsisting *writs*, unless the *Court* is of the view that such a limitation on the operation of the order would make it unworkable or ineffective.

APPLICATION FOR ATTACHMENT ORDER

Application to judge

20 An application for an attachment order shall be made to a judge.

Who may apply

21

(1) A *claimant* who has commenced or is about to commence proceedings in Alberta to establish his *claim* may apply for an attachment order.

Section 21 (continued)

3. Subsection (2) establishes the jurisdiction of the court to make an attachment order for the purpose of preserving assets located in Alberta that might be required to satisfy a judgment in proceedings that have been commenced before a foreign tribunal.

Section 22

1. Reference: Recommendations PJR 25-29.

2. It might be thought that subsection (3) is redundant to the last part of subsection (2), but that is not the case. Subsection (2) requires that full and fair disclosure of all material information known to the claimant be made. Subsection (3) requires each deponent to state that he or she has made full and fair disclosure.

Section 23

Reference: Recommendations PJR 38, 39.

Section 24

1. Reference: Recommendations PJR 32, 34, 35.

2. The main purpose of this section is to establish that *ex parte* attachment orders are temporary. They will automatically expire unless renewed within a short time on an application made on notice to the defendant.

(2) A *claimant* who has commenced proceedings before a foreign tribunal to establish his *claim* may apply for an attachment order if

(a) a *judgment* or award of the foreign tribunal could be enforced in Alberta by action or by proceedings under an enactment *dealing* with the reciprocal enforcement of *judgments* or awards, and

(b) the *defendant* appears to have *exigible property* in Alberta.

Ex parte application

22

(1) An application for an attachment order may be made ex parte.

(2) The material supporting an ex parte application for an attachment order shall state with as much precision as possible the amount of the *claim*, and shall make full and fair disclosure of all material information known to the *claimant*.

(3) Every affidavit filed in support of an ex parte application for an attachment order shall state that it makes full and fair disclosure of all material information known to the deponent.

(4) An application for an attachment order may be granted notwithstanding any defect of form in the material relied upon in support of the application.

Claimant's undertakings

23

(1) An attachment order shall not be granted unless the *claimant* undertakes to pay any damages or indemnity that the *Court* may decide should be paid to the *defendant* or a third *person*.

(2) The *Court* may at any time require the *claimant* to give such additional undertakings as the *Court* considers appropriate.

(3) The *Court* may require the *claimant* to provide security for any undertaking.

APPLICATIONS AFTER ORDER GRANTED

Continuation or termination of ex parte attachment order

24

(1) Unless continued, an *ex parte* attachment order expires on the expiry date specified in the order, which shall not be more than 21 days after the order is granted unless special circumstances justify a later expiry date.

(2) An application to continue an *ex parte* attachment order beyond its expiry date shall be made on notice to the *defendant*.

Section 24 (continued)

3. Subsection (4) serves two purposes. First it is intended to make it clear that the onus remains on the claimant to establish that the attachment order should be continued. Second, it emphasizes that the issue on the "continuance" application is whether the material before the court at that time justifies an attachment order. The issue is not whether the material that was before the judge on the *ex parte* application justified the granting of an attachment order.

4. Subsection (5) says that the Court always retains a discretion to terminate the an *ex parte* attachment order that was obtained without full and fair disclosure. In deciding how to exercise this discretion, the Court would undoubtedly consider such matters as whether the non-disclosure was innocent or deliberate.

Section 25

1. Reference: Recommendations PJR 33, 36, 37.

2. This section does not specify the circumstances in which the court may terminate or modify an attachment order. The court is intended to have a wide discretion to terminate or modify an attachment order whenever the circumstances suggest that it is appropriate to do so.

Section 26

1. Reference: Recommendation PJR 41.

2. It is anticipated that this section will seldom be used. The purpose of an attachment order is to prevent the property to which it applies from being dealt with improperly, not to permit the property to be sold before the claimant has obtained judgment.

Section 27

1. Reference: Recommendation PJR 14.

2. Recommendation PJR 14 refers only to registration in the LTO, because the PPSA had not been enacted at the time our Prejudgment Remedies Report was issued. However, the arguments made in our Report for allowing registration of attachment orders in the LTO apply equally to registration in the PPR.

Section 28

Reference: Recommendation PJR 20.

Section 29

1. Reference: Recommendation PJR 22.

2. This section mediates between two opposing considerations. The first is that an attachment order is not intended to give the claimant any sort of proprietary interest in the defendant's property. The second is that a third person who knows of an attachment order should not be able to disregard it with impunity. This section mediates these tensions by providing a remedy against the third person only where the third person knowingly participates in a transaction that is inconsistent with an attachment order.

(3) If it is impracticable to hear and determine an application to continue an *ex parte* attachment order prior to its expiry date, the *Court* may extend the expiry date for such period as is necessary to allow the application to be dealt with.

(4) On either an application to continue or an application to terminate an *ex parte* attachment order,

(a) the *claimant* has the onus of establishing that the order should be continued, and

(b) the issue shall be determined on the basis of whether the material now before the *Court* justifies an attachment order.

(5) Notwithstanding subsection (4)(b), the *Court* may terminate an ex parte attachment order where the *claimant* has failed to make full and fair disclosure of material information in obtaining the order.

Termination or modification at any time

25 On application by any interested *person*, the *Court* may at any time terminate or modify an attachment order, and, in particular, may modify the order so as to except certain *property* or *dealings* from its operation.

Sale or disposition of attached property

26 The *Court* may authorize the sale or other disposition of attached *property* without the consent of its owner if for any reason, including the likelihood that the *property* would depreciate substantially in value or would be unreasonably expensive to keep under attachment pending conclusion of the proceedings, it appears necessary or prudent to sell or dispose of the *property*.

EFFECT AND DURATION OF ORDER

Registration of attachment order

27 A *claimant* may record an attachment order affecting *land* in the Land Titles Office, and may register an attachment order affecting *personal property* in the *Personal Property Registry*.

No effect on other enforcement proceedings

28 Any *money judgment* may be enforced against attached *property* to the same extent and in the same manner that it could have been if the *property* had not been attached, and the proceeds of *enforcement proceedings* may be *distributed* without regard to the attachment.

Effect on third persons

29

(1) A *person* who has knowledge of an attachment order and who knowingly assists or participates in a *dealing* that is inconsistent with the order may be ordered

(a) to compensate any *claimant* or *enforcement creditor* who has suffered actual loss as a result of the *dealing*, or

Section 30

1. Reference: Recommendation PJR 21.

2. This section emphasizes the non-proprietary nature of an attachment order. Under s. 29(1)(b) a person who acquires attached property from a defendant in a transaction that he or she knows to be inconsistent with the terms of the attachment order may be required to return the property to the defendant. But this is a personal liability, rather than a flaw in title. An innocent transferee from the original transferee would not be subject to an order under s. 29(1)(b).

Section 31

1. Reference: Recommendation PJR 40.

2. Perhaps the most likely scenario for the extension of an attachment order pursuant to subsection (2) is where the claimant's action is dismissed at trial upon a difficult question of law, and the claimant applies for the order to be continued pending an appeal.

Section 32

1. Reference: Recommendation 7.

2. Note that the creditor must have a subsisting writ: see s. 36.

(b) to return to the *defendant* any attached *property* acquired by the third *person* through the *dealing*.

(2) For the purposes of subsection (1)

(a) in the absence of evidence to the contrary, a *person* who assists or participates in a disposition of *property* against which an attachment order is recorded in the Land Titles Office or registered in the *Personal Property Registry* may be presumed to have acted with knowledge of the order, and

(b) where a *person* is subject to a legal duty in favour of someone other than the *defendant* when he receives notice of an attachment order, nothing that is necessary for him to do in order to perform that duty shall be regarded as assisting or participating in a *dealing* inconsistent with the order.

(3) An order under subsection (1)(a) shall be for the benefit of all *persons* referred to in subsection (1)(a), in proportion to the amount of their respective losses.

(4) Nothing in this section restricts the power of the *Court* to punish for contempt.

Transfers not affected

30 Except as provided by section 29(1), a transfer or other *dealing* with attached *property* is as valid and effective as it would have been if the *property* had not been under attachment.

Automatic termination of order

31

(1) Unless otherwise ordered by the *Court*, an attachment order terminates upon the dismissal or discontinuance of the *claimant's* proceeding, or sixty days after entry of a *judgment* in favour of the *claimant*.

(2) The *Court* may extend the operation of an attachment order beyond the times set out in subsection (1) if it appears just to do so.

PART 3

WRITS OF ENFORCEMENT

GENERAL

Subsisting writ required

32 Except as otherwise expressly provided, a *judgment creditor* who does not have a subsisting *writ* may not initiate any *enforcement proceedings*.

Section 33

1. Reference: Recommendation 21.

2. Subsection (1) ties the issuing of a writ in to the time during which a judgment creditor can bring an action on the judgment, and not be met with a limitations defence. See s. 4(1)(f) of the *Limitation of Actions Act* and s. 11 of the *Model Limitations Act* set out in our Report on Limitations.

3. Subsection (3) says that the creditor may deliver the writ to the sheriff for registration, but does not in terms require the sheriff to register it. This latter point is dealt with by s. 8(2), which requires the sheriff promptly to register any document presented for registration.

Section 34

1. Reference: Rule 356.

2. This serves one of the functions served by Rule 356. Rule 356 also deals with the granting of leave to issue a writ more than 6 years after the date of the judgment. That part of r. 356 is dispensed with, since under the JEA a writ can be issued without leave at any time during the 10 year "life" of the judgment.

Section 35

1. Reference: Recommendation 138; ECA, s. 28.

2. The requirements regarding the statement of status are designed to ensure that, as far as is possible, the Enforcement Registry contains an accurate, up-to-date record of the amount outstanding on all subsisting writs.

3. Subsection (2)(a) does not require the registration of a statement of status when a creditor receives a payment from a sheriff on a distribution under the JEA, because the records of the Enforcement Registry can be updated automatically when the sheriff makes the distribution.

Issuing and registering writ

33

(1) A *judgment creditor* may require the Clerk of the Court in whose office the *judgment* has been entered to issue a *writ* in respect of the *judgment* at any time before the expiration of 10 years from the date of the *judgment*.

(2) The *writ* shall be in prescribed form and shall set out

- (a) the names of the *judgment* debtor and the *judgment creditor*,
- (b) the date of the *judgment*,
- (c) the amount of the *judgment*, including costs payable by the *judgment* debtor,
- (d) the amount presently outstanding on the *judgment*, if it is different than the amount of the *judgment*,
- (e) the rate of interest payable on the outstanding amount, or on any particular portion of the outstanding amount, and
- (f) the *judgment creditor*'s address for service.

(3) The *judgment creditor* may deliver the *writ* to a *sheriff* for registration in the Enforcement Registry.

Change in parties

34 Where any change occurs in the *persons* entitled to enforce a *money judgment*, or the persons against whom the *judgment* may be enforced, a *person* claiming to be entitled to enforce the *judgment* may apply to the *Court* for leave to issue a *writ* showing the proper parties, or to amend a *writ* that has already been issued.

Statement of status

35

(1) An *enforcement creditor* may at any time deliver a statement of status to a *sheriff* for registration in the Enforcement Registry.

(2) An *enforcement creditor* shall deliver a statement of status to a *sheriff* for registration in the Enforcement Registry not more than 1 month after

- (a) he receives any money or other *property* in full or partial satisfaction of the *enforcement debt*, otherwise than under a distribution under this Act, or
- (b) enforcement of his *judgment* is stayed or suspended, whether by order or by agreement.

(3) A statement of status shall be in prescribed form and shall state

Section 36

1. Reference: Recommendation 138; ECA, s. 29.

2. The idea of a subsisting writ is fundamental to the JEA. Only creditors with a subsisting writ (called "enforcement creditors") may take any steps to enforce a money judgment, or participate in a distribution of the fruits of enforcement activities.

3. Subsection (1) sets out two requirements, both of which must be met for a writ to be considered "subsisting". First, the judgment must still be "in force": see subsection (2). Second, the writ must be registered in the Enforcement Registry: see subsection (4).

4. Subsection (3) contemplates a situation such as the following. Nine years and 10 months after a money judgment was originally granted, C initiates proceedings to get a judgment on the judgment. However, in contemplation of the possibility a new judgment on the original judgment will not be granted within the 10 year period, C obtains and files the certificate contemplated by subsection (3). This ensures that for the purposes of the JEA, the original judgment will remain in force until it is replaced by the new judgment, or until the proceedings to get a "new" judgment are dismissed or discontinued.

(a) the particulars of any change in the amount outstanding on the *judgment* since a statement of status was last registered, or since the *writ* was issued if no statement of status has previously been registered, including particulars of any payments received, costs that have become payable, or interest that has accrued,

(b) the amount presently outstanding on the *judgment*, including costs and accrued interest, and

(c) in the case of a statement required by subsection (2)(b), particulars of the stay or suspension of enforcement.

Subsisting writ

36

(1) A *writ* subsists only while the *judgment* upon which it is issued, or any *judgment* based on the original *judgment*, is in force, and the *writ* is registered in the Enforcement Registry.

(2) For the purposes of subsection (1), a *judgment* is not in force

(a) if it has been satisfied,

(b) while its enforcement is stayed or suspended, or

(c) after the expiration of 10 years from the date of the *judgment*.

(3) Where, prior to the expiration of the time mentioned in subsection (2)(c), a *judgment creditor* causes to be registered in the Enforcement Registry a certificate of the Clerk of the *Court* certifying that the creditor has commenced proceedings to obtain a *judgment* on the original *judgment*, subsection (2)(c) does not apply unless the proceedings are discontinued or dismissed.

(4) For the purposes of subsection (1), the registration of a *writ* in the Enforcement Registry expires

(a) on the anniversary of the initial registration of the *writ*, if no statement of status has been filed,

(b) on the anniversary of the registration of the most recently registered statement of status, or

(c) when the *enforcement creditor* fails to submit a statement of status as required by section 35(2).

Section 37

1. Several sections of this refer to the amount outstanding on a writ. This section describes how that amount is to be calculated.

2. Basically, the amount outstanding on a writ is its "face amount" (as determined by the writ or the most recent statement of status) adjusted to take account of the events that have occurred since the writ or statement of status was registered.

3. The rationale for including the costs identified in subsection (2) in the amount outstanding on a writ without the need to file a statement of status is efficiency. This subsection attempts to identify costs that, when incurred by an enforcement creditor, will automatically be known to a sheriff, who can adjust the records of the Enforcement Registry accordingly. Amounts actually paid by the creditor to a sheriff fall in this category, as do taxable costs to which an enforcement creditor is entitled in respect of instructions given to a sheriff. The sheriff usually will have no independent knowledge of other sorts of costs, such as the costs of an application to the court. Therefore, such costs must be included in a statement of status before they can be counted as part of the amount that is outstanding on the creditor's writ.

(5) Where the registration of a *writ* in the Enforcement Registry has expired, the *judgment creditor* may revive the registration by registering a statement of status, but such revival has no retrospective effect.

Amount outstanding on writ

37

(1) The amount outstanding on a subsisting *writ* is the sum of

(a) the amount outstanding on the *judgment* as set out in the *writ* or the most recently registered statement of status,

(b) costs referred to in subsection (2),

(c) any interest that has accrued since the *writ* was issued or the statement of status was registered,

minus any amount received by the creditor on account of the *judgment* since the *writ* was issued or the statement of status was registered.

(2) The following expenses incurred by an *enforcement creditor* after a statement of status was last registered, or incurred after his *writ* was issued, if no statement of status has been registered, shall automatically be added to the amount outstanding on the *writ*:

(a) amounts paid to a *sheriff* in respect of the *sheriff's* fees or expenses;

(b) taxable costs to which the *enforcement creditor* is entitled in respect of

(i) the issuing or registration of documents by or with a *sheriff*, or

(ii) instructions given to a *sheriff* in relation to any *enforcement proceedings*.

(3) Nothing in this section limits the discretion of the *Court* regarding costs.

BINDING EFFECT OF WRITS OF ENFORCEMENT

Definitions

38

(1) In sections 39 through 49

(a) "after-acquired property" means property acquired by an *enforcement debtor* after the relevant *writ* is *registered* in the *Personal Property Registry;*

Section 38

1. The definition of "register" in clause (1)(b) is crucial, in that it refers to the Personal Property Registry, rather than the Enforcement Registry. The binding effect of a writ on personal property depends on registration in the Personal Property Registry.

2. Most of the terms set out in clause (1)(c) are defined in s. 1(1) of the PPSA. The terms "buyer of goods", "ordinary course of business of the seller", and "seller" are defined in s. 30(1) of the PPSA.

3. There are several places in ss 39-49 where a purchaser of certain property is said to have priority unless he has knowledge that the property is bound by a writ. Subsection (2) is intended to prevent a purchaser who knew that a writ was registered against D and that D owned the property in question from arguing that he or she did not appreciate that the writ bound the property. In other words, persons who know that a writ is registered against D are presumed to know that the writ binds all D's personal property. However, a person who knows that a writ is registered against D is not presumed to know that any particular item of property is owned by D. That would be a question of fact.

Section 39

1. Reference: Recommendations 10, 11.

2. It will be noted that, in this section and elsewhere, the JEA refers to a writ being "recorded" on the certificate of title. This term is intended to be equally applicable to a land titles regime in which writs are "registered" on title or noted on title by means of a caveat or other mechanism.

Section 40

1. Reference: Recommendations 11, 14.

2. An exception must be read in to subsection (1) for serial number goods. An earlier version of this model Act stated expressly that serial number goods are not bound by a writ unless the writ is registered by serial number against such goods. However, we have been advised that this result is achieved by the regulations under the PPSA.

3. This section does not state the circumstances in which land is bound by a writ, since this is provided for in s. 17.1(8) the *Land Titles Act* ("LTA"). It is assumed that s. 17.3 of the LTA will be in force by the time the JEA comes into operation.

Section 41

This section is intended to state as clearly as possible exactly what is meant by the "binding effect" of a writ. Subject to the exceptions that follow, an interest acquired in property that is bound by a writ is subordinate to the writ, and liable to be extinguished altogether by the sale of the property in the course of enforcement proceedings.

(b) "register" or "registration", means register or registration in the *Personal Property Registry*;

(c) the following terms have the meaning given to them by the *Personal Property Security Act*:

"buyer of goods"; "consumer goods"; "goods"; "inventory"; "money"; "new value; "ordinary course of business of the seller"; "purchase"; "purchase-money security interest"; "purchaser"; "security interest"; "seller"; "value".

(2) For the purposes of sections 39 through 49, a *person* who knows that a *writ* is registered in the Personal Property Registry is deemed to know that the *writ* binds all *personal property* of the *enforcement debtor* named in the *writ*, but is not deemed to know that any particular *property* is or was owned by the *enforcement debtor*.

Necessity of registration

39

(1) A subsisting *writ* may be *registered* in the *Personal Property Registry* and recorded in the Land Titles Office in accordance with the provisions of the *Personal Property Security Act* and the *Land Titles Act*.

(2) A *writ* does not bind or otherwise affect the *enforcement debtor*'s interest in any *personal property* until *registered* in the *Personal Property Registry*, or in any *land* until recorded on the certificate of title for that *land* in the Land Titles Office.

Writ binds personal property upon registration

40

(1) A subsisting *writ* binds all of the *enforcement debtor*'s *exigible personal property* upon *registration*.

(2) Subsection (1) applies to *after-acquired property* of the *enforcement debtor* from the time the debtor acquires it.

Subordination of subsequent interests

41

(1) Except as otherwise provided in sections 42 through 47 or in any other Act, an interest acquired in *property* that is bound by a *writ* is subordinate to the *writ*.

(2) Where an interest in *property* is subordinate to a *writ*,

(a) the *property* is subject to *enforcement proceedings* to the same extent it would have been if the subordinate interest did not exist, and

(b) a *person* who acquires the *property* as a result of *enforcement proceedings* obtains title free of the subordinate interest.

Section 42

1. Reference: Recommendation 20; *Seizures Act*, s. 4(1)(b) (as amended by the PPSA, s. 97(b)).

2. When reading this and the succeeding sections, it should be kept in mind that in contrast to the situation under the former law, there is no gap between the time that a writ binds personal property and the time that the writ is registered in the PPR. There is no such thing as property that is bound by a writ that has not yet been registered in the PPR. Therefore, it is unnecessary to deal with the situation where a writ binds property but has not yet been registered in the PPR.

3. Section 20(1)(a) of the PPSA subordinates unperfected security interests to the claims of creditors entitled to share in a distribution of the proceeds of a seizure or garnishment where the seizure or garnishment takes place before the security interest is perfected. Section 35(5) of the PPSA similarly limits the priority of a perfected security interest in respect of future advances (that is, advances made by the secured party after the property in question has been seized or attached).

4. The situation envisaged by subsection (2) could arise where an enforcement debtor has granted a security interest that is to cover after-acquired property. If the debtor acquires property after the writ is registered in the PPR, the writ would bind the property at the same time that the security interest attaches to it. Priority between the writ and the security interest would then be determined by their order of registration in the PPR.

5. Subsection (3) deals with a situation that is similar to but significantly different from the one dealt with by subsection (2). If an enforcement debtor buys a chattel on a conditional sales basis, the writ would probably bind the chattel at the same time that the conditional seller's security interest attaches. The chances are good that the conditional seller will not have a chance to perfect the security interest before the buyer (the enforcement debtor) gets possession of the chattel. Subsection (2) would give the writ priority. But subsection (3) gives the conditional seller priority, so long as the security interested is perfected within the 15 day period referred to in clause (3)(a).

Section 43

1. Reference: Recommendations 14, 15, 18; PPSA, s. 30(2)-(4), (6)-(8); *Seizures Act*, s. 4(2)-(4) (as amended by the PPSA, s. 97(b)).

2. In one respect, subsection (1) is less generous to buyers and lessees than is the corresponding provision of the PPSA: s. 30(2). Subsection (1) applies only in favour of buyers or lessees who do not have knowledge of the writ, whereas s. 30(2) of the PPSA protects the buyer or lessee unless he or she knows not only of the existence of the security interest, but also that the sale or lease constitutes a breach of the relevant security agreement.

3. In another respect subsection (1) is more favourable to the buyer or lessee than is s. 30(2) of the PPSA. The latter only protects the buyer or lessee where the relevant security interest was granted by the seller. By contrast, subsection (1) protects the buyer or lessee against any writ that binds the goods in question. Suppose, for example, that D sells goods to T1 in circumstances such that T1's interest is subordinate to the writ against T1. If T1 sells the goods to T2 in the ordinary course of the former's business, T2 is protected unless he had knowledge of the writ.

Priority between writs and certain security interests

42

(1) Subject to sections 20(1)(a) and 35(5) of the *Personal Property Security Act*, a *security interest* that attaches to *personal property* before the *property* is bound by a *writ* has priority over the *writ*, whether or not the *security interest* is perfected.

(2) Subject to subsection (3), a *writ* that binds *after-acquired property* at the same time that a *security interest* attaches to the property has priority over the *security interest* if and only if the *writ* was *registered* before the *security interest* was perfected.

(3) Subject to sections 20(1)(a) and 35(5) of the *Personal Property Security Act*, a *purchase money security interest* has priority over a *writ* that was *registered* before the *purchase money security interest* was perfected if the *security interest* is perfected not later than 15 days after

(a) the day the debtor, or another *person* at the request of the debtor obtains possession of the collateral, or

(b) the *security interest* attaches, where the *property* is an intangible.

Dispositions of goods in certain circumstances

43

(1) A buyer or lessee of *goods* sold or leased in the *ordinary course of business of the seller* or lessor takes free of any *writ* that binds the *goods* unless the buyer or lessee buys or leases with knowledge that the *goods* are bound by a *writ* or are under seizure.

(2) A buyer or lessee of goods that are acquired as *consumer goods* takes free from a *writ* that binds the *goods* if the buyer or lessee

(a) gave *value* for the interest acquired, and

(b) bought or leased the *goods* without knowledge that the *goods* are bound by a *writ* or are under seizure.

(3) Subsection (2) does not apply to

(a) a *fixture*, or

(b) *goods* the *purchase* price of which exceeds $1000 or, in the case of a lease, the market *value* of which exceeds $1000.

(4) A sale or lease under subsection (1) or (2) may be

(a) for cash,

Section 44

1. Reference: PPSA, ss 36, 37.

2. Fixtures and growing crops present special problems, because it seems appropriate to treat them, for some purposes, as part of the land to which they are attached, while for other purposes it seems more appropriate to treat them as personal property. The JEA acknowledges the special characteristics of both growing crops and fixtures, although it takes a slightly different approach to each. As far as growing crops are concerned, they are treated, for the most part, as personal property: see s. 1(1)(p). But certain provisions, including this section, acknowledge the close connection (so to speak) between a growing crop and the land upon which it is growing. The converse is true in the case of fixtures. Their common law characterization as part of the land to which they are attached is acknowledged, but for certain purposes they are treated as still being personal property.

3. Subsection (1) contemplates a situation where a chattel that is bound by a writ is attached to land under circumstances in which it becomes, according to the legal principles that govern such matters, part of the land. Subsection (1) says, in effect, that notwithstanding this change in its legal character, it remains bound by the writ as if it were still personal property. Note, however, that none of these provisions regarding "fixtures" would apply to building materials: see s. 1(1)(1),(c). Building materials are treated as land for all purposes.

4. The effect of ss. 36(5) and 37(4) of the PPSA is that priority between a writ that binds a fixture or growing crop and a security interest in the fixture or crop would depend on which of them was recorded first in the LTO.

5. Suppose that D purchases a furnace and hooks it up to the house that he rents. Assume also that the furnace thus becomes a fixture, and that notice of the writ(s) is not recorded against the title to the house. The landlord (L) later sells the house to T. L is not protected by s. 44(4), since this provision only applies in favour of someone who acquires land that contains a fixture that is bound by a writ. So, subject to the protections afforded L by s. 105, C could have caused the furnace to be seized and sold while L was still the owner of the house. However, T fits squarely within and is protected by s. 44(4).

Section 45

1. Reference: Recommendations 17, 18, 49; PPSA, s. 31(1),(3),(4),(5).

2. This section is intended to preserve the negotiability of negotiable documents that are bound by a writ. Note, however, that there is no equivalent here to s. 31(4.1) of the PPSA. For transfers in the ordinary course of the transferor's business s. 31(4.1) defines knowledge of a security interest in an instrument, security or negotiable document of title (collectively, "paper") as knowledge that the transaction by which a purchaser or holder acquired the paper violated the terms of the relevant security agreement. As in the case of "ordinary course of business" sales of goods, we have taken the position that a potential transferee of paper who knows that it is bound by a writ should be presumed to know that the debtor is not entitled to transfer the paper.

3. Subsection (1) should be read with s. 1(2), which describes the circumstances in which individuals and various kinds of juridical persons are considered to have knowledge of a particular fact.

(b) by exchange for other *property*, or

(c) on credit,

and includes delivering *goods* or a *document of title* to *goods* under a pre-existing contract for sale but does not include a transfer as *security* for, or in total or partial satisfaction of, a *money* debt or past liability.

Fixtures and growing crops

44

(1) A chattel that becomes a *fixture* while it is already bound by a *writ* continues to be bound by the *writ*.

(2) Where a chattel that is bound by a *writ* becomes a *fixture*, or where a *writ* binds a growing *crop*, the *enforcement creditor* may cause notice of that fact to be recorded on the certificate of title for the *land*.

(3) Any question of priorities between a *writ* and a *security interest* in a *fixture* or growing *crop* shall be determined in accordance with section 36(5) or section 37(4) of the *Personal Property Security Act*.

(4) Where a *person* acquires an interest in a *fixture* or growing *crop* that is bound by a *writ* by acquiring an interest in the *land* upon which the *fixture* or *crop* is located, his interest is not subordinate to the *writ* unless the notice referred to in subsection (2) was recorded on the certificate of title before he acquired the interest.

(5) Subsections (2), (3) and (4) apply only to *land* for which a certificate of title has been registered under the *Land Titles Act*.

Negotiable documents

45

(1) For the purpose of this section, a *person* is considered to have knowledge of a *writ* if he has knowledge that the relevant *property* is bound by a *writ* or is under seizure.

(2) A holder of *money* has priority over a *writ* that binds the *money* if he

(a) acquired the *money* without knowledge of the *writ*, or

(b) is a holder for *value*, whether or not he has knowledge of the *writ*.

(3) A *purchaser* of an *instrument* or *security certificate* has priority over a *writ* that binds the *instrument* or *security certificate* if he gave *value*, acquired it without knowledge of the *writ*, and took possession of it.

Section 46

1. Reference: Recommendation 49.

2. The purpose of this section is to preserve the negotiability of securities that are commonly dealt with on securities markets without the exchange of physical security certificates.

Section 47

1. Reference: PPSA, s. 32.

2. This section is identical to the corresponding *PPSA* provision, with the obvious exception that the latter subordinates security interests, while the former subordinates writs, to liens.

Section 48

1. The purpose of this section is to make it clear that seizure is not a particularly significant event, so far as the debtor's ability to transfer "good title" to a third party is concerned. A third party who bought property bound by a writ from the debtor before it was seized would be in the same position as a third party who bought the property from the debtor after it was seized. In either case, their position would be determined by the priority rules set out in the sections mentioned.

2. Sections 41 through 47 do not make seizure entirely irrelevant. In certain situations, knowledge that property has been seized may deprive a third party of priority over a writ: see ss. 43(1)(2), 45, 46. Also, seizure can be relevant in certain situations involving competing security interests; it is made relevant by ss. 20(1)(a) and 35(5) of the PPSA, which are referred to in s. 42 of this Act.

Section 49

1. Reference: Recommendation 147.

2. This is intended to eliminate any scope for argument that writs against the same enforcement debtor can be "tacked" onto each other for the purpose of determining priorities against adverse interests. A writ will only establish a priority against adverse interests up to the amount of the writ.

Section 50

1. Reference: Recommendation 22.

2. Having delivered an affidavit to the sheriff, the enforcement debtor will be subject to cross-examination in accordance with the ordinary practice of the court.

Section 51

Reference: Recommendation 24 (2nd para.).

(4) A holder of a negotiable *document of title* has priority over a *writ* that binds the *document of title* if he gave *value* and acquired it without knowledge of the *writ*.

(5) A *purchaser* of *chattel paper* has priority over a *writ* that binds the *chattel paper* if he gave *new value*, took possession of it in the ordinary course of his business, and at the time of taking possession did not have knowledge of the *writ*.

Market securities

46 A *purchaser* who *purchases* a *market security* in a transaction that is settled through a *clearing agency* has priority over a writ that binds the *market security* if the *purchaser* does not have knowledge at the time of settlement that the *market security* is bound by a writ or is under seizure.

Priority of liens

47 Where a *person* in the ordinary course of business furnishes material or services with respect to goods that are bound by a *writ*, any lien that he has with respect to the materials or services has priority over the *writ* unless the lien is given by an Act that provides that the lien does not have priority.

Effect of seizure

48 The position of a *person* who acquires an interest in *personal property* bound by a *writ* is determined by sections 41 through 47, whether the *property* has been seized or not.

No piggybacking

49 An interest in *property* is not subordinate to a *writ* by reason only of the fact that the interest is subordinate to another *writ*, but nothing in this section creates any priority as between *writs*.

PART 4

INFORMATION REGARDING DEBTORS' PROPERTY

Debtor's voluntary statement

50 An *enforcement debtor* may deliver to a *sheriff* for registration in the Enforcement Registry an affidavit regarding the matters referred to in section 52(1).

Information from municipality

51

(1) In this section, "municipality" means a city, town, new town, village, summer village, county, municipal district, improvement district or special area.

(2) An *enforcement creditor* is entitled to demand and receive from a municipality a description of any *land* that according to the assessment roll of the municipality is owned by the *enforcement debtor*.

Section 52

1. Reference: Rules 372(1),(2), 373(1).

2. This section combines the rules relating to examination of an individual debtor and examination of an officer of a corporate debtor, as the substance of the rules is essentially the same.

3. The phrase "touching his estate and effects", which appears in Rule 372(1) is omitted because it would add nothing to the references to "property", given the wide definition of this term in s. 1(1). A reference to amounts remaining unpaid upon the stock or shares of a corporate debtor is omitted for the same reason.

Section 53

Reference: Rules 372(3), 373(2).

Section 54

Reference: Rules 374, 375.

(3) A municipality may charge a reasonable fee for providing the information referred to in subsection (2).

Examination without order

52

(1) An *enforcement creditor* may without order examine the *enforcement debtor* or, where the debtor is a corporation, any of its officers on oath regarding

(a) the *property* and means the debtor had when the liability to which the *judgment* relates was incurred, or if the *judgment* is for costs only, when the proceedings were commenced,

(b) the *property* and means the debtor still has,

(c) any disposal of *property* made by the debtor since incurring the liability, or if the *judgment* is for costs only, since the proceedings were commenced, and

(d) where the debtor is a corporation, the name and address of, and other pertinent information relating to, any director or former director of the corporation.

(2) No further examination may be conducted without an order until one year after the conclusion of the preceding examination.

Examination of employees

53 On the order of the *Court*, an *enforcement creditor* may examine an employee or former employee of the *enforcement debtor* with respect to any matter about which he could examine the debtor or an officer of the debtor under section 52.

Examination of transferee or person in possession of debtor's property

54

(1) Where it appears that the *enforcement debtor* has transferred any *exigible property* to another *person* since

(a) the liability to which the *judgment* relates was incurred, or

(b) the proceedings were commenced, where the *judgment* is for costs only,

the *Court* may order the *person* or, if the *person* is a corporation, any of its officers, to submit to examination under oath.

(2) The person examined pursuant to an order under subsection (1) may be examined regarding

(a) any disposal of *property* made by the *enforcement debtor* since the dates referred to in subsection (1), and

Section 55

Reference: Rules 379.

Section 56

1. Reference: Recommendation 24 (1st para.).

2. This allows the court to require a person who has information about the debtor's property to disclose it without necessarily submitting to a formal examination.

Section 57

1. Reference: Rule 382.

2. We have not included a provision corresponding to r. 376, which deals with service of an appointment on the person to be examined. Since the rules dealing with examinations for discovery deal with that subject, and this section incorporates those rules, it seems unnecessary to deal specifically with service of the appointment for an examination under this part.

Section 58

Reference: Rule 377.

Section 59

Reference: Recommendation 23.

Section 60

Reference: Rule 380.

Section 61

1. Subsection (1) serves much the same purpose as s. 5(1) of the *Seizures Act*, but is more general.

(b) any *obligation* owed to the *enforcement debtor*.

(3) Where there are reasonable grounds for believing that a *person* has possession or control of any *exigible property* of the *enforcement debtor*, the *Court* may order the *person* or, if the *person* is a corporation, any of its officers to submit to examination under oath regarding the *property* of the debtor.

Examination of other persons

55 Where a difficulty arises in the enforcement of a *judgment*, the *Court* may by order require any *person* to submit to examination under oath regarding any matter mentioned in the order.

Disclosure without examination

56 Where there are reasonable grounds for believing that a *person* has information regarding *exigible property* of an *enforcement debtor*, the *Court* may order the *person* to disclose the information in writing to an *enforcement creditor* or *sheriff*.

Rules of Court for discovery apply

57 The Alberta Rules of Court relating to examination for discovery apply with any necessary modifications to all examinations authorized by this Part.

Failure to attend or answer questions

58 A *person* liable to be examined who does not attend and does not provide a sufficient reason for not attending, or if attending, refuses to disclose any of the matters in respect of which he may be examined may be held in civil contempt.

Sheriff to be given copies

59

(1) An *enforcement creditor* shall deliver a copy of any appointment or order for an examination under this Part to the *sheriff*.

(2) An *enforcement creditor* who conducts an examination under this Part and obtains a transcript of the examination shall deliver the transcript to the *sheriff*.

Costs

60 The costs of any examination under this Part are in the discretion of the *Court*.

PART 5

SEIZURE OF PERSONAL PROPERTY

When seizure available

61

(1) Subject to subsection (2) any *exigible personal property* of an *enforcement debtor* may be seized and dealt with in accordance with this Part.

Section 61 (continued)

2. Subsection (2) is intended to avoid unnecessary and possibly confusing overlap between garnishment and seizure.

Section 62

1. Reference: Recommendation 26.

2. This is one case where "sheriff" refers to a sheriff's office: see s. 1(1)(ii).

Section 63

1. Reference: Recommendations 27, 30, 31; ECA, s. 4(1),(2)(a).

2. There is no reference here to indemnification of the sheriff against liability incurred by the sheriff in carrying out the seizure instructions. Any liability will fall upon the assurance fund created under Part 12. Section 181(2) defines the circumstances in which the instructing creditor will be required to indemnify the assurance fund, and s. 182 allows the court to order the instructing creditor to furnish security in this regard. Ordinarily, though, the creditor would not be required to furnish security.

3. Subsection (1)(b) covers ground that is already covered by s. 12. However, it was thought desirable to include subsection (1)(b), even if it is strictly necessary.

(2) Except as provided in Part 6 or as authorized by the *Court*, *obligations* subject to garnishment under Part 8 are not subject to seizure.

EFFECTING AND GIVING NOTICE OF SEIZURE

Seizure instructions to any sheriff

62

(1) An *enforcement creditor* may instruct any *sheriff* to effect seizure, but the *sheriff* may forward the instructions or any part of them to another *sheriff* for execution.

(2) A *sheriff* who forwards seizure instructions to another *sheriff* shall inform the *instructing creditor*.

Instructions to seize

63

(1) A *sheriff* is required to attempt to effect seizure only when the *instructing creditor* has

- (a) given the *sheriff*
  - (i) written instructions to effect seizure,
  - (ii) as many copies of the *seizure documents* as the *sheriff* requires, and
  - (iii) such information regarding the nature and location of the *property* to be seized as the *sheriff* reasonably requires, and
- (b) paid the sheriff's fees and reasonably anticipated expenses of carrying out the instructions, or made arrangements for payment that are satisfactory to the *sheriff*.

(2) The *seizure documents* referred to in subsection (1)(a) are

- (a) a notice of seizure in prescribed form,
- (b) a notice of objection in prescribed form, together with a sufficiently stamped envelope addressed to the *sheriff* having responsibility for the seizure,
- (c) the *instructing creditor's writ* of enforcement, and
- (d) instructions to debtor in prescribed form.

Section 64

1. Reference: Recommendation 132; ECA, s. 4(3); *Exemptions Act*, s. 7; *Seizures Act*, s. 45.

2. Although subsection (1) serves the same purpose as s. 4(3) of the ECA, it will be noted that there is no mention of the sheriff's warrant, as in s. 4(3)(c) of the ECA. Section 11 of the JEA removes the need for a warrant, and any information that might usefully have been included in the warrant can as easily be included in the notice of seizure.

3. Subsection (2) authorizes a sheriff to seize property in which there are reasonable grounds for believing that the enforcement debtor has an exigible interest. Of course, this does not ensure that the debtor will have an exigible interest in such property. Other sections make sure that the debtor will have ample opportunity to contest the exigibility of the property, and that third persons will have ample opportunity to assert that the property belongs to them, not to the debtor: see ss. 73-75 (debtor) and ss. 76-78 (third persons). In addition provision is made for compensation of third persons who suffer some pecuniary injury as a result of seizure of their property: see s. 178.

4. Strictly speaking, the part of subsection (2) that begins with "but" is probably unnecessary. If property "appears to be exempt", the sheriff is unlikely to have reasonable grounds for believing that the debtor has an exigible interest in it. The "but" clause does, however, emphasize the importance of trying to avoid seizing exempt property.

5. Clause (3)(a) is based on s. 45 of the *Seizures Act*. Clause (7)(b) serves a similar purpose, but is concerned with the situation where the difficulty is not in distinguishing exempt from exigible property, but in confining the seizure by reference to the value of the seized property. It might be difficult, for example, to estimate the realizable value of certain property. Or perhaps there are subsisting writs totalling $3000, and the sheriff has found a bin full of grain belonging to D, which the sheriff estimates to be worth $5,000. Unless the sheriff is to remove the seized portion at once, it will be rather difficult to identify and seize $3000 worth of the grain in the bin.

Section 65

1. Reference: Recommendation 38.

2. This section can be compared with s. 150(1)(b), which provides a similar remedy but depends on a judge's order. The advantage of the remedy under this section is that it does not require an application to the court. The main comparative advantages of the remedy under s. 150(1)(b) are 1) its flexibility and adaptability to particular situations and 2) that it is based on a court order and, if ignored, can be enforced through proceedings for contempt.

Property subject to seizure

64

(1) After being instructed to seize, a *sheriff* shall attempt to seize enough of the debtor's *exigible personal property* to satisfy all subsisting *writs* and the sheriff's fees and expenses.

(2) A *sheriff* may seize any *personal property* in which there are reasonable grounds for believing the *enforcement debtor* has an *exigible* interest, but shall not seize any *property* that appears to be *exempt*.

(3) Where at the time seizure is effected it is not practicable to

(a) distinguish *exempt* from *exigible property*, or

(b) limit the value of the *property* seized to the amount of the subsisting *writs* against the *enforcement debtor*,

the *sheriff* may seize all the *property* in question until the part that is *exempt* or in excess of what is required to satisfy the *writs* can be identified and segregated, whereupon the *sheriff* shall release the *exempt* or excess *property* from seizure.

Notice to third person requiring delivery

65

(1) Where

(a) there are reasonable grounds for believing that *property* of an *enforcement debtor* that is subject to seizure is in the possession or control of a third *person*, and

(b) the *sheriff* is unable to effect seizure of the *property*,

the *sheriff*, if so instructed by the *instructing creditor*, shall serve a demand on the third *person*.

(2) The demand shall be in prescribed form and shall

(a) identify the *property* of the *enforcement debtor* believed to be in the possession or control of the third *person*, and

(b) require the third *person* to deliver the *property* to the *sheriff* or make it available for seizure within 14 days of service of the notice.

(3) A *person* who is served with a demand under this section complies with it by

(a) delivering the *property* to the *sheriff*, or

Section 66

1. Reference: Recommendation 32; *Seizures Act*, s. 25(1).

2. Subsection (1)(a) does not require the sheriff do perform the task of identifying the seized property in the notice of seizure. Often, the instructing creditor will want the sheriff to seize a particular item, such as a car or some other valuable chattel. In such cases, the enforcement creditor may identify the property to be seized in the notice of seizure before sending the seizure documents to the sheriff.

3. Subsection (1)(b)(ii) refers to attaching the seizure documents "to property being seized", rather than to "the property being seized". Thus, a sheriff's officer who is seizing many different items at the same premises complies with this particular requirement by attaching the seizure documents to any one of the items.

4. Subsection (2) is important in the context of the notice of objection procedure. Referring to s. 72(1), it will be noted that the 14 day period for filing a notice of objection does not commence until the seizure documents are served on the enforcement debtor or an adult member of the debtor's household.

5. Subsection (3) would allow the instructing creditor to bring an application for an order authorizing sale of the seized property, even though the debtor had not been served with the seizure documents nor filed a notice of objection. Normally, the debtor would still have to be served with notice of the application, but the court would be able to make an order for substituted service, if that was considered appropriate.

(b) advising the *sheriff* of the place at which seizure of the *property* may be effected and taking reasonable steps to ensure that the *property* remains at that place until it is seized.

(4) The *sheriff* shall compensate the third *person* for any expense reasonably incurred in order to comply with the demand.

(5) A third *person* who without reasonable excuse fails to comply with a demand under this section is liable to compensate *enforcement creditors* for any pecuniary loss suffered by them as a result of such non-compliance.

(6) When the *sheriff* takes possession of *property* that was the subject of a demand under this section, the third *person* is discharged of any responsibility he may have been under to hold the *property* for, or return it to, the debtor.

Effecting seizure

66

(1) Seizure is effected when

(a) the *property* being seized is identified in the notice of seizure, and

(b) the *sheriff*, while at the premises or place where the *property* is located, either

(i) serves the *seizure documents* on the *enforcement debtor*, an occupant of the premises or anyone who has possession or control of the *property*, or,

(ii) if there is no such *person* present, attaches the *seizure documents* to *property* being seized or posts the *seizure documents* at a conspicuous location on the premises.

(2) A sheriff who effects seizure without serving the *seizure documents* on the *enforcement debtor* or an adult member of the debtor's household shall serve the *seizure documents* on the debtor as soon after effecting seizure as is practicable.

(3) Where the *sheriff* is unable to serve the *seizure documents* on the *enforcement debtor* or an adult member of the debtor's household, the *instructing creditor* may proceed as if the debtor had been served with the *seizure documents* and filed a notice of objection.

Entry unto premises

67

(1) In order to effect seizure or to remove previously seized *property*, a *sheriff* may enter

Section 67

1. Reference: Recommendation 33; *Seizures Act*, s. 23.

2. This section divides premises into four categories, according to whether they are private dwellings and whether they are occupied by the debtor. The four categories are (1) private dwellings occupied by the debtor, (2) private dwellings not occupied by the debtor, (3) other premises (non-dwellings) occupied by the debtor, and (4) other premises not occupied by the debtor.

3. The tightest restrictions are placed on forcible entries. Forcible entry can be made to any premises under a court order, but in the absence of a court order forcible entry can be made only to premises that are occupied by the debtor and that are not a private dwelling. Typically, this would be business premises occupied by the debtor.

4. Assuming that a forcible entry is not contemplated, the main restriction is for private dwellings not occupied by the debtor. If, for example, the sheriff has reasonable grounds for believing that property of the debtor is stored at the home of a friend of the debtor, the sheriff may enter the friend's home only with his or her permission or under an order of the court.

Section 68

Reference: Recommendation 33.

Section 69

This section recognizes that it is possible for innocent procedural slip-ups to occur in the course of a seizure, and takes the position that the seizure should nevertheless be considered valid. If anyone would be prejudiced by the slip-up, subsection (2) allows the court to order that the seizure be discontinued.

Section 70

1. Reference: Recommendations 35, 40; *Seizures Act*, ss 16, 17.

2. Subsection (1) gives the final say on whether seized property is to be removed (at least as between the instructing creditor and the sheriff) to the creditor. However, the requirement that the creditor pay the removal and storage charges would be a deterrent to unnecessary removals. And, of course, the creditor cannot require the sheriff to seize (or remove) property that appears to be exempt: see s. 63(2).

(a) any premises, other than a *private dwelling* not occupied by the debtor, where there are reasonable grounds for believing that *property* of the debtor is on the premises, or

(b) any premises with the permission of an occupant or under an order of the *Court*,

but a *sheriff* may use force to gain entry to any premises only as provided by subsection (2).

(2) A *sheriff* may use reasonable force to gain entry

(a) to any premises occupied by the *enforcement debtor*, other than a *private dwelling*, if it is not otherwise practicable to gain entry, or

(b) to any premises under an order of the *Court*.

(3) A sheriff who has gained lawful entry to premises may, if necessary, break into any interior room or enclosure, or into any container, in order to gain access to the *enforcement debtor's property*.

(4) A sheriff who uses force to gain entry to premises shall make them reasonably secure before leaving.

Time of seizure

68 A *sheriff* shall effect seizure at a time of day that is reasonable in all the circumstances, and, unless otherwise ordered by the *Court*, shall effect seizure at a *private dwelling* only between 6 A.M. and 9 P.M.

Seizure valid notwithstanding irregularity

69

(1) Where a *sheriff* purports to effect a seizure, the seizure is valid notwithstanding any irregularity in the procedure by which it is effected.

(2) The *Court* may order a seizure to be discontinued if satisfied that someone has been or is likely to be prejudiced because of an irregularity in the procedure by which the seizure was effected.

Custody of seized property

70

(1) An *instructing creditor* who has paid the *sheriff's* reasonably anticipated removal and storage expenses or who has made arrangements for payment that are satisfactory to the *sheriff* may require the *sheriff* to remove seized *property* for safekeeping.

(2) Subject to subsection (1), the *sheriff* may in his discretion remove seized *property* for safekeeping at any time after effecting seizure.

Section 70 (continued)

3. There are cases in which property will be seized and left in the debtor's possession, even though the debtor has not signed a bailee's undertaking. One possibility is that the enforcement debtor may be absent when the sheriff effects seizure. Subsection (4) imposes the obligations of a bailee on an enforcement debtor who has possession of seized property and who has been served with the seizure documents, whether or not he or she has signed an undertaking.

Section 71

1. Reference: Recommendation 32 (last para.); *Seizures Act*, s. 25(3),(5).

2. It will be noted that although this section is very similar to the corresponding provisions of the *Seizures Act*, the penalty for the offence has been left unspecified. The *Seizures Act* specifies a penalty of $200 or 60 days imprisonment in default of payment. We are content to leave the penalty to be determined by the *Provincial Offenses Procedure Act*.

Section 72

This section requires sheriffs to do what they already do as a matter of practice. Under the existing practice, the instructing creditor receives a bailiff's report, and other creditors are given written notice of the seizure.

Section 73

1. Reference: Recommendation 39; *Seizures Act*, s. 27.

2. It will be noted in subsection (1) that the 14 day period begins to run only after the debtor (or an adult member of the debtor's household) is served with the seizure documents. This may occur after the seizure is actually effected.

(3) Subject to subsection (1), the *sheriff* may appoint the *enforcement debtor* or some other person as bailee of the seized *property* upon the debtor or other person signing an undertaking to hold the *property* for the *sheriff* and deliver it up to the *sheriff* on demand.

(4) An *enforcement debtor* who has possession or control of seized *property* and who has been served with the *seizure documents* holds the seized *property* as bailee for the *sheriff*, and shall deliver it up to the *sheriff* upon demand, whether or not he has signed an undertaking in that regard.

(5) Prior to removing seized *property*, the *sheriff* shall prepare and sign an inventory of the *property* to be removed and give a copy of it to the *person* having possession of the *property*, or if no such *person* is then present, give a copy of it to the *enforcement debtor* as soon as it is practicable to do so.

Identification by sticker

71

(1) A *sheriff* who has seized any article may attach a sticker in prescribed form to the article for the purpose of identifying it as being under seizure and distinguishing it from other similar goods.

(2) The sticker shall be signed by the *sheriff* and shall briefly describe the article to which it is attached.

(3) Any *person* who without lawful authority removes, damages or otherwise interferes with

(a) a sticker that has been attached to an article in accordance with this section, or

(b) an article to which a sticker has been attached in accordance with this section

is guilty of an offence.

Report to instructing creditor

72 The *sheriff* shall report in writing to the *instructing creditor* within a reasonable time after seizing or attempting to seize, and shall give written notice of any seizure to every *enforcement creditor*.

OBJECTION TO SEIZURE

Notice of Objection

73

(1) An *enforcement debtor* who objects to a seizure shall complete the notice of objection, stating the reason for his objection, and deliver it to the *sheriff* within 14 days of the date upon which the *seizure documents* are served on the debtor or an adult member of the debtor's household in accordance with section 66.

Section 73 (continued)

3. The most significant difference between this section and s. 27 of the *Seizures Act* is that subsection (3) of this section makes it clear that a notice of objection received more than 14 days after the debtor is served with the seizure documents is ineffective.

4. Enforcement debtors who fail to file a notice of objection within 14 days are not foreclosed from raising any objection they may have to the seizure. However, if they wish to raise an objection, they must make an application to the court.

Section 74

1. Reference: Recommendations 39, 126; *Seizures Act*, s. 29.

2. This section is considerably shorter than s. 29 of the *Seizures Act*, partly because some of the procedural matters mentioned in s. 29 are dealt with more generally by s. 186 of the JEA.

3. Subsection (1) refers to an effective notice of objection, that is, one that is delivered to the sheriff within the 14 day period referred to in s. 73(1).

Section 75

Reference: *Seizures Act*, s. 29(5)(d).

(2) A notice of objection is not ineffective by reason only of the debtor's failure to properly complete or sign it.

(3) A notice of objection delivered after the expiration of the period referred to in subsection (1) is ineffective, and upon receiving such a notice the *sheriff* shall so notify the debtor.

(4) Notwithstanding subsection (3), an *enforcement debtor* may at any time before the seized *property* is sold apply to the *Court* for the purpose of raising and having determined any objection the debtor may have to the seizure.

Procedure where notice of objection filed

74

(1) Upon receiving an effective notice of objection, the *sheriff* shall immediately notify the *instructing creditor*, who may apply by notice of motion on 7 days notice, or such other notice as the *Court* may approve or direct, for an order authorizing sale.

(2) Unless otherwise ordered by the *Court* or consented to by the *enforcement debtor*, the application shall be made in the judicial district in which the seizure was effected, or, in the case of a seizure of serial number goods pursuant to section 106(2)(b), in the judicial district in which the *seizure documents* were served on the *enforcement debtor*.

(3) The notice of motion shall describe in reasonable detail the *property* in respect of which the order is sought, and give notice that any objection the debtor has to the seizure will be dealt with on the application, and that the seized *property* may be presumed not to be *exempt* in the absence of evidence that it is *exempt*.

(4) On the application

(a) it may be presumed in the absence of evidence to the contrary that the *property* identified in the notice of motion is not *exempt*, and

(b) the *enforcement debtor* may raise any objection he has to the seizure, whether or not it was mentioned in the notice of objection.

Order for sale

75 Where the *Court* makes an order authorizing sale, it may by the same or subsequent order suspend the order pending the payment of the debt by such instalments as the *Court* may fix, or the giving of such security or the performance of such other conditions as the *Court* may impose.

Section 76

1. Reference: Recommendation 154.

2. Sections 76 through 78 implement certain principles in the "Compensation" chapter (Chapter 11) of the report. There the issue was characterized as being one of compensating a third person who suffers loss as a result of his property being seized (and perhaps sold) by a sheriff in the mistaken belief that it belongs to an enforcement debtor. It was pointed out that it is better to prevent third parties from suffering such loss in the first place than to compensate them after it has occurred. Hence, without working out the details, we proposed a procedure that would be directed at resolving disputes over the ownership of seized property in an expeditious manner. These sections contain the details of that procedure.

3. Subsection (1) is intended to ensure, so far as it is possible to do so, that third persons who may have an interest in seized property receive timely notice of the seizure. Once they have received such notice, subsection (2) requires them to assert their claims promptly, by delivering a written claim to the sheriff.

Section 77

1. Reference: Recommendations 154.

2. The consequences of failing to file a notice of claim within the time mentioned in subsection (1) are set out in s. 78.

3. Subsection (2) recognizes that enforcement debtors often file notices of objection indicating that a third person is the true owner of the seized property. Such a notice of objection is treated as a notice of claim filed by the third person.

4. Subsection (4) contemplates the possibility of a third person claiming, for instance, that he is a co-owner of the seized property along with the enforcement debtor. This should not prevent the sheriff from selling the enforcement debtor's admitted interest in the property, if that is considered to be worthwhile by the instructing creditor.

5. Where an effective notice of claim is delivered to the sheriff, subsections (5) through (7) require the instructing creditor (or some other enforcement creditor) to promptly contest the claim. Otherwise, the sheriff must release seizure. It will be noted that "contesting" the third person's claim requires the creditor to make an application to the court. This relieves the sheriff of the burden of having to institute interpleader proceedings, and puts the onus of applying to the court on the enforcement creditor.

THIRD PERSON CLAIMS

Notice to possible claimants

76

(1) A *sheriff* who has reasonable grounds for believing that a third *person* may have an interest in seized *property* shall serve the third *person* with notice of the seizure in prescribed form.

(2) A *person* who is served with notice pursuant to subsection (1) shall have 14 days from the date of receiving the notice within which to deliver a written notice of claim to the *sheriff*.

(3) An enforcement creditor may serve the notice referred to in subsection (1), and the notice has the same effect as if served by the *sheriff*.

Procedure where claim made

77

(1) A notice of claim is effective only if,

(a) in the case of a claim by a *person* who has been served with notice pursuant to section 76, the notice is delivered to the *sheriff* within the period mentioned in section 76(2), or

(b) in any other case, the notice is delivered to the *sheriff* before the seized *property* is sold.

(2) A notice of objection that indicates that a named *person* other than the *enforcement debtor* has an interest in the seized *property* shall be treated as a notice of claim delivered to the *sheriff* by that *person*.

(3) Upon receiving an effective notice of claim, the *sheriff* shall notify the *instructing creditor* of the claim.

(4) An effective notice of claim that admits that the debtor has some *exigible* interest in the *property* does not prevent the *sheriff* from selling the debtor's admitted interest in the *property*, if instructed by the *instructing creditor* to do so.

(5) Except in the case of a claim to which subsection (4) applies, if the *instructing creditor* does not dispute a claim contained in an effective notice of claim within 14 days of being notified of it by the *sheriff*, the *sheriff* shall give written notice of the claim to all other *enforcement creditors*, and if no creditor disputes the claim within a further 14 days, the *sheriff* shall release seizure.

(6) Where a claim is disputed, any *enforcement creditor* may apply to the *Court* on notice to the claimant, the *sheriff*, and every other *enforcement creditor* for a determination of the issue.

Section 78

1. Reference: Recommendations 154.

2. The position of a third person (T) who is served with notice of the seizure and who does not deliver a claim to the sheriff within 14 days is as follows:

- T cannot maintain a claim for compensation (damages) for loss resulting from the seizure, detention or sale of T's property: subsection (1)(a);
- T cannot follow the property into the hands of a purchaser from the sheriff; sale by the sheriff extinguishes T's interest: subsection (1)(b);
- T can, however, assert a claim to the seized property before it is sold by making an application to the Court: subsection (2)(a);
- T can assert a claim to the proceeds of sale by applying to the Court before the proceeds are distributed by the sheriff, but cannot do so afterwards: subsections (2)(b), (3).

3. The position of a third person who is not served with notice, but who does in fact have an interest in the seized property differs from that described above in the following respects:

- T does not lose any right to compensation T would otherwise have for loss resulting from the seizure, detention or sale of the property;
- although the Act does not give T the right to follow the property into the hands of someone who purchases the property from the sheriff, T would have this right at common law, and the Act does not take it away.

Section 79

The presence of a security interest affecting seized property should be readily apparent from the records of the PPR. It should also be apparent whether the security interest has priority over, or is subordinate to, the relevant writ. The procedure contemplated in the preceding sections is, therefore, unnecessary in the case of security interests.

Section 80

1. Reference: *Seizures Act*, s. 25(2).

2. The purpose of this section, and of s. 25(2) of the *Seizures Act*, is to make it clear that seizure is not released except by the deliberate act of the sheriff. This section substitutes registration in the Enforcement Registry for the requirement of "notice in writing" in s. 25(2) of the *Seizures Act*. As a practical matter, the sheriff would usually also have to notify the enforcement debtor and possibly other persons (such as a person who had signed for the bailee's undertaking) that seizure was released.

Section 81

1. Reference: *Seizures Act*, s. 40.

2. This section is shorter than s. 40 of the *Seizures Act*, largely because the procedural matters are dealt with more generally by s. 186 of the JEA.

(7) If no application is made pursuant to subsection (6) within 1 month of the date upon which the *sheriff* received notice that the claim was disputed, the *sheriff* shall release the *property* from seizure.

Claims made outside prescribed period

78

(1) Where a third *person* who has been served with notice pursuant to section 76 does not deliver a claim to the *sheriff* within the time mentioned in section 76(2),

(a) any claim for compensation or cause of action that the third *person* might otherwise have had in respect of the seizure, detention or sale of the *property* identified in the notice is extinguished, and

(b) a *person* to whom the *property* in question is sold by the *sheriff* obtains title free of any interest that the third *person* had in the *property* at the time of the sale.

(2) Notwithstanding subsection (1), any *person* may assert a claim

(a) to the seized *property* itself, by making an application to the *Court* before the *property* is sold, or

(b) to the proceeds of sale of the seized *property*, by making an application to the *Court* before the proceeds are *distributed*.

(3) A *person* who does not assert a claim to the proceeds of seized *property* before the proceeds of sale are *distributed* may not trace or otherwise follow the proceeds.

Non application to security interests

79 Sections 76 through 78 do not apply to security interests in seized *property*.

TERMINATION OF SEIZURE

Duration of seizure

80 Seized *property* remains under seizure until the *sheriff* sells it or releases it from seizure by entering a notice of release of seizure in the Enforcement Registry.

Termination of seizure after 6 months

81 After *property* has been under seizure for 6 months, the *sheriff* may release the *property* from seizure upon giving 2 months written notice to every *enforcement creditor*, but any *enforcement creditor* may apply to the *Court* for an order requiring the seizure to be continued.

Section 82

1. Reference: Recommendation 41.

2. Subsection (3) refers to an effective notice of objection or an effective notice of claim. An effective notice of objection is one that is delivered within the time mentioned in s. 72(1). An effective notice of claim is one delivered within the time mentioned in s. 76(1).

Section 83

1. Reference: Recommendations 42, 43.

2. Subsection (1) recognizes that a sheriff should act promptly on a creditor's instructions to sell, but also recognizes that the sheriff should have some leeway to delay a sale where doing so is likely to produce a significantly better price. If the instructing creditor thinks that the sheriff is delaying a sale for too long or for a marginal or unlikely increase in price, the creditor could apply to the court under s. 13.

3. Subsection (2) requires the sheriff to advise the instructing creditor and the enforcement debtor of the proposed method of sale, but does not say what either of the latter can do if he or she objects to the method of sale proposed by the sheriff. However, either the creditor or the debtor could apply to the court under s. 13, asking the court to direct the sheriff to use some other method of sale.

4. Subsection (3) would allow the method of sale to be set out in the notice of seizure, so that the 14 day period referred to in subsection (2) would run concurrently with the notice of objection period.

5. The first part of subsection (4) merely restates the common law position regarding sales to execution creditors. The latter part recognizes that a private sale to an enforcement creditor may raise special concerns, and that notice of the terms of such a sale should be given to the enforcement debtor and to any other enforcement creditors (who will have an interest in getting the best possible price for the property).

Section 84

Reference: Recommendation 42 (last para.).

SALE

Initiating sale

82

(1) Subject to section 85, the *sheriff* shall not sell seized *property* until instructed to do so by the *instructing creditor*.

(2) The *instructing creditor* may not instruct the *sheriff* to sell seized *property* until

(a) the expiration of the period within which the *enforcement debtor* may deliver a notice of objection in accordance with section 73(1), and

(b) the expiration of the period within which any third *person* who has been served with notice pursuant to section 76 may deliver a notice of claim in accordance with section 76(2).

(3) A sheriff to whom an effective notice of objection or an effective notice of claim is delivered may not sell the *property* to which the objection or claim relates unless the *Court* authorizes a sale, or the *person* delivering the notice of objection or notice of claim withdraws it.

Sale procedure

83

(1) Unless otherwise ordered by the *Court*, the *sheriff* shall sell seized *property* as soon after being instructed to do so as is practicable, but may delay the sale for a reasonable period where the delay is likely to produce a significantly higher price.

(2) A *sheriff* may sell seized *property* by any method the *sheriff* considers likely to produce a reasonable price, but shall notify the *instructing creditor* and the *enforcement debtor* of the proposed method of sale at least 14 days before the *property* is sold.

(3) The proposed method of sale may be set out in the notice of seizure.

(4) A *sheriff* may sell seized *property* to an *enforcement creditor*, but, at least 14 days before selling seized *property* to an *enforcement creditor* by private sale, shall serve notice of the terms of the proposed sale on the *enforcement debtor* and every other *enforcement creditor*.

Where reasonable price cannot be obtained

84

(1) Where a *sheriff* is unable to sell seized *property* for a reasonable price, the *Court* may order that it be sold for the best obtainable price.

Section 85

1. Reference: *Seizures Act*, s. 31(2).

2. Subsection (3) would apply, for example, if it becomes necessary to sell perishable property before the expiration of the notice of objection period. The proceeds of sale would have to be retained until the objection period expires or, if a notice of objection is filed, until the objection is dealt with.

Section 86

1. Reference: Recommendation 44; *Seizures Act*, s. 5(2).

2. The two sections referred to in subsection (1) create exceptions to the general rule that the buyer from a sheriff acquires only the interest that the debtor had in the property. Section 41(2) deals with interests that are subordinate to a writ: generally, interests created after the writ was registered in the PPR. Section 78(1) deals with the situation where a third person is given notice of a seizure but fails to assert a claim to the seized property. Once a sale takes place, such a person is, in effect, estopped from asserting a claim to the property.

3. The effect of subsection (2) is that although the buyer obtains a somewhat fragile title to property purchased from the sheriff, the investment is protected by a claim against the assurance fund.

Section 87

(a): "holder"

1. This term plays a key role in the definition of "intermediary" in clause (b).

2. Under this definition, the same security could be held by two different persons at once. For instance, suppose that a clearing agency (defined in s. 1(1)) is the registered holder of a large number of securities of XYZ Inc. The clearing agency's records show that it holds a certain number of these securities for the account of a certain securities broker. Both the clearing agency and the broker are "holders" of the relevant XYZ Inc. securities, under clause (a)(i) and clause (a)(iii), respectively.

(2) Where a reasonable price for the *property* would not in any event exceed $1000, the *sheriff* may without order sell it for the best obtainable price.

Expeditious sales

85

(1) A *sheriff* may effect an expeditious sale or disposition of seized *property*

(a) under an order of the *Court*, or

(b) without order if the *property* is perishable, depreciating rapidly in value, dangerous, unsanitary or a hazard to health.

(2) A sheriff who sells or disposes of seized *property* without order shall give every interested *person* as much notice as is practicable in the circumstances.

(3) Unless otherwise ordered by the *Court*, the proceeds of sale of *property* sold under this section may not be *distributed* before the earliest time at which the *property* could otherwise have been sold.

Buyer's title

86

(1) Except as provided by sections 41(2) and 78(1), a *person* who buys seized *personal property* from the *sheriff* obtains only the interest of the *enforcement debtor* in the *property*, and the sale does not adversely affect the rights or interest of any third *person* in the *property*.

(2) Where a third *person*'s interest in seized *property* survives a sale by the *sheriff*, and the buyer did not have notice of the interest at the time of the sale, the buyer is entitled to compensation from the *assurance fund* for any resulting pecuniary loss.

(3) The loss recoverable by the buyer under subsection (2), exclusive of prejudgment interest and costs, may not exceed the amount paid by the buyer to the *sheriff* for the *property*.

PART 6

SPECIAL SEIZURE MECHANISMS

Definitions

87 In this Part

(a) "holder", in relation to a *security*, means a *person*

(i) who, or whose nominee, is the registered holder or registered owner of the *security*,

Section 87 (continued)

(b): "intermediary"

1. The most common example of an intermediary is likely to be an enforcement debtor's broker. But the definition comprehends any situation in which a person holds securities for an enforcement debtor.

2. Where an enforcement debtor's securities are actually registered in the name of a clearing agency (securities depository), which holds the securities on behalf of the debtor's broker, the broker, but not the clearing agency is an intermediary. The broker is a holder by virtue of subclause (iii) of the definition of "holder", and holds the securities on behalf of the debtor. The clearing agency is also a holder, but holds the securities on behalf of the broker.

(d): "security"

It will be noted that publicly traded shares of a corporation satisfy both branches of the definition. The first branch of the definition — "a share" — also brings in shares that are not publicly traded. The second branch — "market security" — brings in certain publicly traded obligations and interests that are not shares in a corporation: see the definition of "market security" in s. 1(1).

(e): "security certificate"

There is a different, more complicated, definition of this term in s. 1. That definition, which is relevant to priority issues, is based on the PPSA's definition of "security". The simpler definition found here is suitable for the purposes of this part.

Section 88

This part sets out special seizure procedures for certain kinds of personal property. However, most of the provisions of Part 5 will also apply to seizure proceedings against such property. For example, the notice of objection procedure set out in Part 5 would be applicable to seizure proceedings against property mentioned in this part.

Section 89

1. Reference: Recommendations 45, 46.

2. It would be in accordance with Part 5 for a sheriff to seize an instrument and then leave it on a bailee's undertaking with the person in whose possession it was at the time of seizure. Such a seizure would not impair the negotiability of the instrument in question: see ss 45(2) and 48.

(ii) who has possession of a *security certificate* evidencing the *security*, or

(iii) for whom a *clearing agency* holds the *security*;

(b) "intermediary" means a *holder* who holds the relevant *security* on behalf of an *enforcement debtor*;

(c) "issuer" means the issuer of *securities* that are the subject of seizure proceedings;

(d) "security" means any *share* or *market security*;

(e) "security certificate" means a document evidencing a *security*;

(f) "share" means a share in a body corporate.

(g) "transfer agent" means an entity appointed by an *issuer* as its agent for purposes such as maintaining a *securities* register, recording the transfer of *securities*, or distributing dividends or other payments in respect of its *securities*.

Application of Part 5

88 Except where it would conflict with this Part, Part 5 applies to seizure proceedings against *property* mentioned in this Part.

CASH AND INSTRUMENTS

Seizure of cash or instruments

89

(1) Seizure of cash or an *instrument* shall be effected in accordance with Part 5.

(2) Cash that is seized by a *sheriff* may not be *distributed* as enforcement proceeds until

(a) the expiration of the time within which the *enforcement debtor* can file a notice of objection in accordance with section 73(1), and

(b) the expiration of the period within which any third *person* who has been served with notice pursuant to section 76 may deliver a notice of claim in accordance with section 76(2).

(3) Seizure of an *instrument* constitutes the *sheriff* the irrevocable agent of the *enforcement debtor* for the purpose of liquidating the *instrument*, and, without restricting the generality of the foregoing, the *sheriff* may

Section 89 (continued)

3. Subsection (4) is intended to protect both the sheriff and the enforcement debtor from being sued by a subsequent holder of the instrument in question.

Section 90

1. Reference: Recommendation 48.

2. In many cases, the sheriff will have an option as to the method of effecting seizure. For example, if the security is registered in the name of the enforcement debtor and is evidenced by a security certificate, seizure could be effected in accordance with either subsection (1)(a) or (1)(b). Of course, the sheriff's choice is likely to be constrained by the circumstances. If the enforcement debtor is in possession of negotiable security certificates, the safest course would be to seize the certificates and remove them from the debtor's possession. Otherwise, they could easily find their way into the hands of a purchaser who would be protected by s. 45(3).

3. Nothing is said in this section about serving seizure documents on the enforcement debtor. However, keeping in mind that Part 5 applies to proceedings under this part except where there is a conflict, s. 66(2) requires the sheriff to serve the seizure documents on the debtor once seizure has been effected. The notice of objection period will not begin to run until that is done: see s. 73(1).

Section 91

1. Reference: Recommendations 48, 50.

2. Subsection (1) applies only where the enforcement debtor is the registered holder of the security, because there is no point in serving the notice of seizure on the issuer if the debtor is not the registered holder.

3. Clause (2)(a) applies only to documents or records that registered holders are entitled to receive or inspect. It would not apply, for example, to records that the enforcement debtor is entitled to inspect by virtue of being an officer of the issuer.

(a) present the *instrument* for payment, and receive payment thereon,

(b) sue any *person* liable on the *instrument*, in the name of the debtor, or

(c) negotiate the *instrument*

as if the *sheriff* were specifically authorized by the debtor to do so.

(4) A *sheriff* who endorses an *instrument* on behalf of the *enforcement debtor* shall do so in a manner that will exclude recourse against the debtor or the *sheriff*.

SECURITIES

Effecting seizure

90

(1) Subject to subsection (2), a *sheriff* may seize a *security*,

(a) where the *security* is evidenced by a *security certificate*, by seizing the *security certificate* in accordance with Part 5,

(b) where the *enforcement debtor* is the registered holder of the *security*, by serving the *issuer* with a notice of seizure in prescribed form, or

(c) where the *security* is held by an *intermediary*, by serving the *intermediary* with a notice of seizure in prescribed form,

and if it would be possible to effect seizure by more than one of these methods, the *sheriff* may use whichever method he considers most appropriate to the circumstances.

(2) Seizure may be effected in accordance with subsection (1)(b) or (1)(c) only if the notice of seizure can be served on the *issuer* or *intermediary* in Alberta.

Duties of issuer

91

(1) Where the *enforcement debtor* is the registered holder of a *security* that the *sheriff* has seized otherwise than in accordance with section 90(1)(b), the *sheriff* shall serve the notice of seizure on the *issuer* as soon after effecting seizure as is practicable.

(2) An issuer who has been served with a notice of seizure regarding a *security* of which the *enforcement debtor* is the registered holder shall

Section 92

1. Reference: Recommendations 48, 50.

2. Generally, the information and documents referred to in clause (b) would be the information and documents that the debtor would be entitled to get directly from the issuer if the debtor were the registered holder of the securities.

3. It would be unusual for the sheriff to make the sort of direction contemplated by clause (e). Generally, it would be more convenient for the sheriff to leave the security with the intermediary, and to direct the intermediary to sell or otherwise liquidate the security: see s. 94(1).

4. Clause (f) requires the intermediary to remit to the sheriff any proceeds to which the debtor would otherwise be entitled. Often, a broker who holds securities for a debtor will have a lien on the securities, as where the debtor maintains a margin account. The amount to which the enforcement debtor would otherwise be entitled would be the balance remaining after payment of any commission to which the broker is entitled and payment of any amount necessary to discharge the lien.

Section 93

Reference: Recommendation 50.

(a) send to the *sheriff* any documents and allow the *sheriff* to inspect any records that registered holders of the *security* are entitled to receive or inspect,

(b) pay to the *sheriff* any dividend or other payment in respect of the *security* that would otherwise be payable by the *issuer* to the *enforcement debtor,*

(c) comply with any direction given by the *sheriff* regarding a dividend or payment referred to in clause (b), if the *enforcement debtor* would otherwise be entitled to give the *issuer* such a direction, and

(d) promptly notify any relevant *transfer agent* of the seizure.

Duties of intermediary

92 Where a *sheriff* has seized a *security* by serving a notice of seizure on an *intermediary*

(a) the *intermediary* shall hold the *security* on behalf and in accordance with the directions of the *sheriff,*

(b) the *sheriff* is entitled to receive any information or documents relating to the *security* that the *intermediary* is required to give to the *enforcement debtor,*

(c) the *intermediary* shall pay to the *sheriff* any dividend or other payment in respect of the *security* that would otherwise be payable by the *intermediary* to the *enforcement debtor,*

(d) the *sheriff* is entitled to give any direction to the *intermediary* that the *enforcement debtor* would otherwise be entitled to give in respect of a dividend or payment referred to in clause (c),

(e) if so directed by the *sheriff*, and if it is possible to do so, the *intermediary* shall cause the *security* to be registered in the name of the *sheriff*, or deliver a *security certificate* evidencing the *security* to the *sheriff*, or both, and

(f) if so directed by the *sheriff*, the *intermediary* shall liquidate the *security*, and pay to the sheriff any proceeds to which the *enforcement debtor* would otherwise be entitled.

Liability of issuer or intermediary

93

(1) An *issuer* or *intermediary* who fails to comply with a duty imposed on it by section 91 or 92 is liable for any pecuniary loss suffered by *enforcement creditors* as a result of such failure.

Section 94

1. Reference: Recommendations 51, 52.

2. Subsection (1) uses the term "liquidate" rather than "sell". In most cases, the sheriff would undoubtedly liquidate the security by selling it on the market. But in some cases the appropriate method of liquidation might be surrender for redemption, presentation for payment, or some other mechanism not technically amounting to a sale.

3. Section 168 of the *Business Corporations Act* deals with constraints that may be placed on the issue or transfer of shares in a distributing corporation to comply with "Canadian content" or other statutory restrictions that may affect a corporation.

Section 95

1. Reference: Recommendations 48, 52.

2. Clause (3)(b) is worded broadly, so as not to be confined to particular kinds of rights, such as options. Moreover, the right need not be embodied in any particular document, such as the articles of incorporation or a unanimous shareholder agreement. Even a private agreement between the enforcement debtor and another person would qualify, so long as the sheriff had notice of the agreement.

3. Clause (3)(c) does not require the sheriff to serve every shareholder if there are more than 15 of them. Most corporations whose shares are not market securities will have fewer than 15 registered shareholders. But it is entirely possible for such a corporation to have more than that number of shareholders. In such cases, there would not seem to be a great deal to be gained by serving all these shareholders. In this regard, it should be kept in mind that any shareholders who do have a preferential right to acquire the shares will be served under clause (b).

4. The sheriff's first obligation under subsection (4) is to comply with the sale procedure that the enforcement debtor would have had to follow in order to sell the shares. Therefore, if the enforcement debtor would have been required to offer the shares to a particular person at a pre-determined price, the sheriff's proposal must give that person the first right to acquire the share at that price (subject to subsection (7)). However, if that person fails to exercise the option to acquire the share, the sheriff must then give other shareholders of the corporation a reasonable opportunity to acquire the share in priority to non-shareholders.

5. Subsection (4) gives the sheriff considerable leeway as to the procedure he proposes to follow. For example, it does not attempt to "prioritize" the rights of different classes of shareholders to acquire the shares. If any shareholder or other person with a preferential right to acquire the share considers that the procedure proposed by the sheriff is inappropriate, that person may apply to the court under subsection (8).

(2) An *issuer* is not liable under this section in respect of anything done on its behalf by a *transfer agent* unless at the time the *transfer agent* acts

(a) the *transfer agent* has been notified of the seizure, or

(b) 48 hours have elapsed since the notice of seizure was served on the *issuer*.

(3) Where an *issuer* incurs a liability under this section as a result of anything done by a *transfer agent* after the *transfer agent* has been notified of a seizure, the *transfer agent* is liable to indemnify the *issuer*.

Liquidation of seized security

94

(1) A *sheriff* may liquidate a seized *security* by any means that the nature of and market for the *security* permits.

(2) Except as provided by section 95, no restriction on the transfer of a *security*, other than a constraint under section 168 of the *Business Corporations Act*, applies to the transfer of a *security* by a *sheriff* under this Act.

Procedure for liquidating

95

(1) This section applies only to *shares* that are not *market securities*.

(2) An *issuer* who has been served with a notice of seizure in respect of certain *shares* shall so inform any *person* who requests information from the *issuer* regarding the *enforcement debtor's* ownership of or ability to transfer those *shares*.

(3) Upon being instructed to sell seized *shares*, the *sheriff* shall serve a notice of intended sale on

(a) the *issuer*,

(b) any *person* who, to the knowledge of the *sheriff*, would have a preferential right to acquire the *shares* on a voluntary sale of the *shares* by the *enforcement debtor*, and

(c) every registered shareholder of the *issuer*, if there are 15 or fewer registered shareholders.

(4) The notice of intended sale shall set out the sale procedure the *sheriff* intends to follow, which shall

Section 95 (continued)

6. Subsection (6) amplifies the expression "as closely as possible" in clause (4)(a). The sheriff is not required to follow the procedure that the debtor would have to follow if following that procedure would effectively defeat the whole purpose of the seizure. For example, a sheriff might choose to ignore a requirement that any shareholder give one year's notice to the corporation before selling his or her shares, because it would unreasonably delay the enforcement process.

7. Subsection (7) might apply to an option to purchase the enforcement debtor's shares or to the right of the issuing corporation to redeem the shares. A court would undoubtedly be slow to interfere with pre-existing contractual rights of this nature. However, a court might be persuaded to intervene where the option or redemption price was set at an unrealistically low level in relation to the value of the share.

8. Subsection (9) gives the corporation or any other interested person ample opportunity to apply to the court for a determination of any issue relating to the sale procedure the sheriff intends to follow.

(a) follow as closely as possible any procedure that the *enforcement debtor* would be required to follow in order to sell the *shares*, and

(b) subject to clause (a), provide the *issuer* and existing shareholders of the *issuer* a reasonable opportunity to buy or redeem the *shares* before they are offered for sale to any other *person*.

(5) The *sheriff* shall not take any further steps to sell the *shares* until 14 days after complying with subsection (2).

(6) Subsection (3)(a) does not require the *sheriff* to follow a procedure that would prevent the *shares* from being sold at all or prevent them from being sold within a reasonable time or for a reasonable price.

(7) A *person* who would otherwise be entitled to acquire or redeem the *shares* for a predetermined price or at a price fixed by reference to a predetermined formula is entitled to buy or redeem them from the sheriff for that price, unless the *Court* determines that a sale at that price would unfairly prejudice the *enforcement debtor* or *enforcement creditors*.

(8) At any time before *shares* are sold by the *sheriff*, any *person* referred to in subsection (2) may pay to the *sheriff* an amount sufficient to discharge the *enforcement debt* or debts and any outstanding *sheriff's* fees or charges, and that *person* shall have a lien on the *shares* for the amount paid to the *sheriff*, plus interest.

(9) Upon application by the *sheriff* or any interested *person*, the *Court* may make any order it considers proper regarding the method of liquidating seized *shares*, including an order

(a) approving, with or without modification, or rejecting

(i) the sale procedure proposed by the *sheriff* or by any other *person*,

(ii) any proposed term of sale, or

(iii) any proposed method of realizing the value of the *share* other than sale,

(b) suspending sale proceedings, or

(c) directing that the *issuer* be liquidated and its proceeds disposed of according to law.

Section 95 (continued)

9. Subsection (10) is intended to prevent second-guessing of the procedure that the sheriff used to sell the shares. Thus, anyone who has reservations about the procedure proposed by the sheriff must raise those concerns before the court before the sale.

Section 96

1. Reference: Recommendation 51.

2. This section empowers the sheriff to execute formal transfer documents in place of the enforcement debtor. However, in many cases, it will be unnecessary for the sheriff to enforce a security certificate or execute any sort of formal transfer document, because it would be unnecessary for the enforcement debtor to do so. Where the securities in question are held by an intermediary, the intermediary is likely to have the power to effect a transfer of the debtor's securities without having to get the debtor's endorsement on a security certificate.

Section 97

1. Reference: Recommendation 51.

2. This is very similar to section 75(2) of the *Business Corporations Act*. The main difference here is that the issuer is required to register a transfer, rather than to issue a new security certificate to the original owner (the debtor).

Section 98

1. Subsection (1) is a corollary of the principle adopted in the Report that no restriction on transfer should ultimately be able to prevent the sheriff from transferring a seized share. Thus, when the sheriff has complied with the requirements of s. 96 and sold the share to a purchaser, the purchaser is entitled to have the transfer registered.

(10) Where the *sheriff* has sent a notice of intended sale to the *persons* mentioned in subsection (2), and no application is made under subsection (8) before the *shares* are sold, the sale procedure set out in the notice of intended sale is deemed to have met the requirements of subsection (3).

Execution of transfer documents by sheriff

96

(1) A *sheriff* may do any act or execute or endorse any document that otherwise would have to be done, executed or endorsed by the *enforcement debtor* in order to liquidate a seized *security*, and an act so done or document so executed or endorsed is as effective as if done, executed or endorsed by the *enforcement debtor*.

(2) The *issuer* of a *security* is not required to acknowledge any document executed or endorsed by the *sheriff* pursuant to subsection (1) unless the document is accompanied by the certificate of the *sheriff* stating that the document has been executed or endorsed by the *sheriff* under the authority of this Act.

Missing security certificate

97 Where

(a) a *sheriff* has seized a *security* for which a *security certificate* has been issued,

(b) liquidation of the *enforcement debtor*'s interest in the *security* would ordinarily require presentation of the *security certificate* to the *issuer* or a transfer agent of the *issuer*,

(c) the *security certificate* appears to have been lost, destroyed or wrongfully taken,

(d) it does not appear that the *security certificate* has come into the possession of a *person* whose interest in the *security* would have priority over the relevant *writ*, and

(e) the *instructing creditor* has made satisfactory provision for indemnification of the *issuer* against any liability the *issuer* may incur in respect of the *security certificate*

the *Court* on application may require the *issuer* to acknowledge a transfer or other disposition of the *security* without presentation of the *security certificate*.

Effect of transfer by sheriff

98

(1) Upon presentation of a transfer document endorsed or executed by the *sheriff* in accordance with section 96, the *issuer* shall register the transfer of a registered *security* to the *person* named as transferee in the transfer document.

Section 98 (continued)

2. The principle just referred to does not require that the transferee be permitted to ignore agreements regarding the management of the corporation to which the enforcement debtor was a party. If the enforcement debtor was a party to a unanimous shareholder agreement, the transferee from the sheriff would be deemed to be a party to that agreement by s. 140 of the *Business Corporations Act*. Subsection (2) goes one step further, and declares that the transferee is deemed to be a party to a non-unanimous agreement of which he or she had knowledge at the time of the transfer.

3. Subsection (3) contemplates the possibility that some corporations might try to blunt the effect of section 94(2) and subsection (1) of this section by incorporating into the articles, bylaws or a shareholders agreements provisions that would limit the rights of shareholders who acquire their shares from a sheriff. Subsection (4) gives the court broad powers to deal with such discriminatory provisions.

Section 99

1. Reference: Recommendation 48.

2. The preceding sections do not distinguish between securities issued by Alberta issuers and securities issued by "foreign" issuers. However, it is entirely possible that certain of the foregoing provisions will conflict with the applicable laws of the issuer's home jurisdiction in a way that could prejudice the issuer or a third party. If satisfied that the issuer or third party was likely to suffer some real prejudice, the court could grant appropriate relief.

3. The expression "incorporated or constituted" acknowledges that the issuer of a security is not necessarily a corporation. It might, for example, be a limited partnership.

Section 100

1. Reference: Recommendation 54; *Seizures Act*, s. 8(1).

2. Subsection (1) is quite similar in effect to s. 8(1) of the *Seizures Act*, except that subsection (1) makes it clear that notice must also be given to the enforcement debtor.

3. Subsection (2) contemplates the possibility that the secured party (ie, the enforcement debtor) has neglected to "perfect" the security interest by carrying out the appropriate registrations in the PPR or the LTO.

(2) In addition to any agreement to which the transferee is deemed by section 140 of the *Business Corporations Act* to be a party, the transferee is deemed to be a party to any agreement regarding

(a) the management of the affairs of the *issuer*, or

(b) the exercise of voting rights attached to the seized *shares*

to which the *enforcement debtor* was a party at the time of the seizure, and of which the transferee had knowledge at the time of the transfer.

(3) Notwithstanding subsection (2) and section 140 of the *Business Corporations Act*, the Court may grant a declaration that the transferee is not bound by a term or provision of any agreement, bylaw or article that discriminates against the transferee because he acquired the *securities* through *enforcement proceedings*.

Application to foreign issuers

99 Where a *security* of an *issuer* that is not incorporated or otherwise constituted under the laws of the Province of Alberta is seized under this Act, and the Court is satisfied that the *issuer* or some other *person* is likely to suffer actual prejudice as a result of a conflict between anything in sections 90 through 98 and the laws under which the *issuer* is incorporated or otherwise constituted, the Court may make any order it considers necessary to protect the *issuer* or *person* from being so prejudiced.

SECURED OBLIGATIONS

Seizure of secured obligation

100

(1) Seizure of a *secured obligation* shall be effected by

(a) identifying the *obligation* and the security therefor in the notice of seizure,

(b) registering the notice of seizure in the Land Titles Office or *Personal Property Registry*, as may be appropriate, and

(c) serving the *seizure documents* on the *enforcement debtor*.

(2) If the *enforcement debtor*'s security interest has not been registered in the Land Titles Office or *Personal Property Registry* when the *secured obligation* is seized, the *sheriff* may register the security interest.

Section 101

Reference: Recommendation 55; *Seizures Act*, s. 8(4),(5).

Section 102

Obligations, secured or otherwise, that are market securities or are evidenced by an instrument are dealt with earlier in this part.

Section 103

1. Reference: *Seizures Act*, ss 10, 13(5),(7),(8).

2. The *Seizures Act* contains a lengthier series of provisions on the subject of seizing and selling agricultural products than is contained in this and the following section. Most of the specific provisions of the *Seizures Act* are adequately dealt with by the general provisions of the JEA.

3. The provisions in the *Seizures Act* corresponding to subsection (2) date back to 1933. At that time, the two main marketing alternatives for agricultural products were sale on the open market or participation in a co-operative (contractual) marketing scheme. Today, the marketing of many agricultural products is regulated by the *Canadian Wheat Board Act* (Canada) and the *Canada Grain Act* (Canada) or by plans established by regulations under the *Marketing of Agricultural Products Act*. Such plans serve much the same function as the co-operative marketing schemes contemplated by s. 13(7),(8) of the *Seizures Act*. Subsection (2) is intended to capture any such marketing arrangement.

Section 104

1. Reference: *Seizures Act*, s. 13(1),(2),(3).

2. This section recognizes that, without the contemplated expenditures, there would be no proceeds to be distributed. The rationale behind legislation such as the *Threshers' Lien Act* would apply equally to harvesting expenses incurred by the sheriff. That the sheriff (or a creditor who pays the sheriff) is given a charge, as opposed to a mere preference on distributions, may be of significance where there is a prior security interest in the crop.

Section 105

1. Reference: PPSA, 36(8),(11),(12),(13),(14).

2. The purpose of subsections (1) and (2) is to ensure that a fixture will be severed from the land to which it is affixed only if it is reasonable to do so. If the fixture is attached to land that is owned by the enforcement debtor, the proper method of enforcement would be to sell the debtor's interest in the land, rather than to remove and sell the fixture. If the fixture is affixed to land owned by the debtor that is exempt, the fixture should also be exempt. Assuming that the land is owned by someone other than the debtor, whether it is proper to allow the sheriff to seize and remove the fixture must depend on whether, as far as the fixture is concerned, the writ has priority over the land owner's interest: see s. 44.

Collecting secured obligation

101

(1) After seizing a *secured obligation*, the *sheriff* may serve the notice of seizure on the *person* liable to pay the *obligation*, whereafter that *person* shall pay to the *sheriff* any amount that is or becomes payable in respect of the *obligation*.

(2) After serving the notice of seizure on the *person* liable, the *sheriff*, as an alternative to selling the *secured obligation* under Part 5, may collect the *obligation* through any proceedings, including an action or enforcement of the security, that could otherwise have been taken by the *enforcement debtor*.

Non-application to securities and instruments

102 Sections 100 and 101 do not apply to a *market security* or an *obligation* evidenced by an instrument.

AGRICULTURAL PRODUCTS

Seizure and sale of growing crops

103

(1) A *sheriff* may seize growing *crops* of the *enforcement debtor*, but shall not sell a seized *crop* until it has been harvested.

(2) The *sheriff* has the same rights and duties as the *enforcement debtor* regarding the sale of seized *agricultural products* under any applicable marketing legislation or plan.

Harvesting expenses

104

(1) Unless the *enforcement debtor* undertakes to harvest a seized *crop*, the *sheriff* may require the *instructing creditor* to provide security for the payment of any harvesting expenses that may be incurred by the *sheriff*.

(2) If the *instructing creditor* does not provide the requested security, the *sheriff* may release the *crop* from seizure.

(3) Any harvesting expenses incurred by a *sheriff* in connection with a seized *crop* are a first charge on and payable out of the proceeds of the *crop* in priority to any other claim.

(4) The benefit of the charge referred to in subsection (1) extends to an *enforcement creditor* who has paid the harvesting expenses incurred by the *sheriff*.

FIXTURES

Seizure of fixtures

105

(1) A *fixture* may be seized and sold as *personal property* only in the circumstances set out in subsection (2), or as authorized by the *Court*.

Section 105 (continued)

3. As is the case with their counterparts in the PPSA, subsections (3) through (7) assume that the land owner's interest in the fixture is subordinate to the writ.

4. Sections 75 through 77 establish a general procedure for dealing with third party claims to seized personal property. Since subsection (5) establishes a specific procedure for dealing with certain claims against fixtures, the procedure set out by sections 75 through 77 would be redundant in the case of such claims. That is the reason for subsection (8).

(2) A *fixture* bound by a *writ* may be seized and sold in accordance with Part 5 where

(a) the fee simple interest in the *land* to which the *fixture* is affixed is not beneficially owned by the *enforcement debtor*, and

(b) any interest in the *fixture* of a *person* having an interest in the *land* is subordinate to the *writ*.

(3) Where a *fixture* is seized and removed, any *person* other than the *enforcement debtor* who had an interest in the *land* at the time the *fixture* was affixed to the *land* is entitled to reimbursement from the *sheriff* for any damage to his interest caused during the removal of the *fixture*, but is not entitled to reimbursement for diminution in the value of the *land* caused by the absence of the *fixture* or the need to replace it.

(4) Any *person* with an interest in the *land* to which a *fixture* is affixed may retain the *fixture* by paying to the *sheriff* the lesser of

(a) the amount for which his interest in the *fixture* is subordinate to any *writs*, and

(b) the market value of the *fixture*,

and upon such payment the *fixture* ceases to be bound by any *writ* against the *enforcement debtor*.

(5) A *sheriff* who seizes a *fixture* shall serve on each *person* who appears by the records of the land titles office to have an interest in the *land* a notice containing

(a) a description of the seized *fixture* and of the *land* to which it is affixed,

(b) the amount for which *writs* are alleged to have priority over the *person*'s interest in the *fixture*,

(c) a statement that the *fixture* may be removed and sold unless the amount referred to in subsection (4) is paid on or before a specified date that is not less than 14 days after the notice is served.

(6) The notice required by subsection (5) may be served in accordance with section 188 or by registered mail addressed to the address of the *person* to be notified as it appears in the records of the land titles office.

Section 106

Reference: Recommendation 37.

Section 107

Reference: *Seizures Act*, s. 24.

(7) A *person* entitled to receive a notice under subsection (5) may apply to the *Court* for an order postponing removal of the *fixture* from the *land*, or for the determination of any issue relating to the seizure.

(8) Sections 76 through 78 do not apply to the interest in a seized *fixture* of a *person* who is entitled to notice under subsection (5).

SERIAL NUMBERED GOODS

Seizure of serial numbered goods

106

(1) In this section "serial number goods" means serial number goods as defined by the Personal Property Security Regulation.

(2) *Serial number goods* may be seized

(a) in accordance with Part 5, or

(b) by registering in the *Personal Property Registry* a notice of seizure that identifies them by serial number, and serving the *seizure documents* on the *enforcement debtor*.

MOBILE HOMES

Seizure of mobile home

107

(1) When a *mobile home* is seized, if

(a) the *mobile home* is occupied by the *enforcement debtor* or some other *person*, and

(b) the occupant fails, on demand, to deliver up possession of the *mobile home*,

the *instructing creditor*, on notice to the occupant, may apply to the *Court* for an order directing the occupant to deliver up possession of the *mobile home*.

(2) The order shall provide

(a) that if the occupant fails to deliver up possession of the *mobile home* within the time specified in the order, the *sheriff* shall eject and remove the occupant together with all *property* he may have in the *mobile home*, and

(b) that if it is not possible otherwise to obtain possession the sheriff, either by himself or with the assistance of any *persons* that he requests, may use force to gain entry to the *mobile home*.

Section 108

Reference: Recommendations 57, 59.

Section 109

1. Reference: Recommendation 59.

2. Nothing is said here about employing the services of a real estate agent. This is because s. 11 provides generally for the employment of professional agents by sheriff's officers.

Section 110

1. Reference: Recommendations 57, 126.

(3) On there being filed with the *sheriff* an affidavit

(a) showing service of the order on the occupant, and

(b) stating that the occupant has failed to deliver up possession of the *mobile home* as requested by the order,

the *sheriff* shall forthwith proceed to obtain possession of the *mobile home* as authorized by the order.

PART 7

LAND

Initiating sale of land

108 To initiate the sale of an *enforcement debtor's land*, an *enforcement creditor* shall

(a) instruct a *sheriff* in writing to sell the *land*,

(b) suggest a method of sale to the *sheriff*, and

(c) provide any documents or information required by the *sheriff*.

Method of sale

109 An *enforcement debtor's land* may be sold by any method the *sheriff* considers likely to produce a reasonable price.

Notice of sale

110

(1) Upon being instructed to sell *land*, the *sheriff* shall

(a) issue a notice of sale,

(b) register the notice of sale in the Enforcement Registry,

(c) serve the notice of sale on the *enforcement debtor*,

(d) deliver the notice of sale to the *instructing creditor*, and

(e) in the case of *land* that is registered under the *Land Titles Act*,

(i) cause the notice of sale to be recorded on the certificate of title for the *land*, and

(ii) serve the notice of sale on every *person* with a registered or caveated interest in the *land*.

Section 10 (continued)

2. Clauses (c), (d) and (e) of subsection (2) should be read with s. 113.

Section 111

"Land" is defined in s. 1(1) as not including growing crops. This section is intended to make it clear that, the definition notwithstanding, a sale of land under this part can include crops growing on the land. In many cases, it would be more sensible for a sheriff to sell a growing crop as part of the land upon which it is growing than to seize and sell the crop as personal property.

Section 112

Reference: Recommendation 58.

Section 113

1. Reference: Recommendation 126.

2. The effect of this section is that to claim the value-limited exemption for a non-farm home (ie, maximum $40,000), the enforcement debtor need only file an appropriate claim with the sheriff. If such a claim is filed, the sale would proceed, but the first $40,000 of the proceeds would be paid to the enforcement debtor. If the enforcement debtor claimed that the land in question was completely exempt under the farm home exemption, his or her claim would have to be asserted through an application to the court.

(2) The notice of sale shall be in prescribed form and shall

- (a) describe the *land* that is to be sold,
- (b) state the proposed method of sale,
- (c) state that any objection the *enforcement debtor* has to the sale must be raised by an application to the *Court*,
- (d) state that if the *land* is the *enforcement debtor*'s home, the debtor may claim an exemption up to the amount set out in section 158(2) by delivering a written claim to the *sheriff*,
- (e) state that if the *enforcement debtor* does not apply to the *Court* or deliver a claim to the *sheriff* within 6 months of service of the notice of sale, he will not subsequently be able to assert that the *land* is either wholly or partially *exempt*.

(3) The steps referred to in subsection (1)(c) and (e) may be carried out by the *instructing creditor* instead of the *sheriff*, at the option of the creditor.

Inclusion of growing crops in sale of land

111 Growing *crops* may be sold as part of a sale of *land* under this Part if the notice of sale clearly indicates that the *crops* are to be sold along with the *land*.

Waiting period

112

(1) Subject to subsection (2), the *sheriff* shall not take any further steps to sell the *land* until 6 months after completing the steps required by section 110.

(2) The *Court* may extend or shorten the period referred to in subsection (1), but may not shorten the period unless it first determines that the *land* is not *exempt*.

Determination of exemptions

113

(1) Before the expiration of the time mentioned in section 112, the *enforcement debtor* may

- (a) apply to the *Court* for a declaration that the *land* is *exempt*, or
- (b) deliver to the *sheriff* a written claim that the *land* is the debtor's home.

(2) Unless the Court orders otherwise, an *enforcement debtor* who delivers a claim to the *sheriff* in accordance with subsection (1)(b) shall be presumed to be entitled to the exemption described in section 158(1)(b).

Section 114

1. Reference: Recommendation 60.

2. The office of subsection (1) is to prevent the sheriff from suffering the embarrassment of entering into a contract for sale of the debtor's land that appears to be unconditional, and then having the debtor or some other person object to the sale. Since contracts for the sale of land are customarily subject to numerous conditions, the inclusion of a condition such as this should not be a major impediment to finding a buyer.

3. The main object of this section is to eliminate the need for court approval of a proposed sale, unless someone actually objects to it. Thus, subsection (2) requires the sheriff to notify interested persons of the terms of the proposed sale, and subsection (3) puts the onus on such persons to apply to the court to raise any concerns they may have.

4. Subsection (5) would supplant s. 125 of the LTA, which requires court confirmation of any sheriff's sale. Instead, the sheriff would certify that the persons mentioned in subsection (2) have been served with the required notice, and that none of them have applied to the court.

5. Subsection (6) addresses the issue of the "quality" of the title that the purchaser from the sheriff gets. Its main purpose is to make it clear that any interests that were recorded on title after the first writ was recorded on title are extinguished by the sheriff's sale.

Section 115

Reference: Recommendation 62.

Section 116

Reference: Recommendation 61.

(3) An *enforcement debtor* who does not apply to the *Court* or file a claim within the time mentioned in section 112 may not subsequently assert that the *land* is or was wholly or partially *exempt*.

Completion of sale

114

(1) Every contract for the sale of *land* entered into by a *sheriff* under this Part shall be expressed to be subject to this section.

(2) Upon entering into a contract for the sale of *land* the *sheriff* shall serve written notice of the terms of the sale on every *person* who was served with the notice of sale, and, if the contract is with the an *enforcement creditor*, on every other *enforcement creditor*.

(3) A *person* served with notice of the terms of sale must raise any objection he may have to the sale through an application to the *Court* made within 14 days of the date of service of the notice on all the persons referred to in subsection (2).

(4) When an application is made under subsection (3) the *Court* may either confirm or direct the *sheriff* not to complete the proposed sale, and in either case may give such further directions to the *sheriff* as it considers proper.

(5) If no application is made within the time mentioned in subsection (3), the sale may be completed and the *land* may be transferred without the approval of the *Court*, but the *sheriff* shall certify on the transfer of land that he has complied with subsection (2) and that no application has been made to the *Court* within the time mentioned in subsection (3).

(6) Upon presentation of a transfer of land duly executed by the *sheriff*, the Registrar of Land Titles shall issue to the transferee a certificate of title free of any encumbrance or interest that was not recorded on the certificate of title before the first of the *writs* under which the *land* was sold was recorded thereon.

Severance of joint tenancy

115 *Enforcement proceedings* against an *enforcement debtor*'s interest as a joint tenant of *land* sever the joint tenancy only when the *sheriff* has entered into an agreement to sell the debtor's interest.

Dower consent not required

116 Notwithstanding the *Dower Act*, the *sheriff* may sell *land* under this Act without obtaining the consent of the *enforcement debtor*'s spouse, and the buyer obtains title to the *land* free of any right that the *enforcement debtor*'s spouse may have had in the *land* under the *Dower Act*.

Section 117(1)

(a): "current obligation"

1. The reference in this definition to a portion of an obligation contemplates a situation such as this. G owes D $1,000. $500 is payable now, and $500 is payable a month from now. For the purposes of this part, the $500 that is payable now is a current obligation. The other $500 would be a future obligation: see clause (d).

2. Conditions to which s. 148(1) applies are certain conditions that may attach to deposit accounts, but which are to be ignored for the purpose of determining whether the account is payable.

(b): "deposit account"

This definition is based on the definition of "deposit account" in s. 9-105(e) of the *Uniform Commercial Code* (1972 official text).

(c): "employment earnings"

Reference: Recommendation 115; *Employment Standards Act*, s. 1(1)(s).

(d): "future obligation"

1. Reference: Recommendation 72.

2. The purpose of this definition is to identify the situations in which a garnishee summons may be issued against an obligation that has not yet arisen, or at least not yet become payable, but which may yet arise or become payable as a result of some relationship or connection between the garnishee and the enforcement debtor. This definition defines the sort of relationship or connection that will suffice for this purpose.

3. It will be noted that the various clauses of this definition are not mutually exclusive. For example, the sort of obligation that would be covered by clause (c)(ii) would almost certainly be covered by clause (c)(i) also, since an employment relationship will almost certainly involve an agreement between the employer and the employee.

4. Several of the clauses of this definition refer to an obligation that may or will "arise or become payable". Much of the case law concerning garnishment is devoted to the distinction that has been drawn between an existing debt that is not yet payable, and a debt that does not yet even exist. Under the present law, the former are garnishable and the latter are not. The JEA wants nothing to do with that distinction. Therefore, the definition lumps together obligations that may "arise" in the future and obligations that may "become payable" in the future.

5. Clause (i) refers to an obligation that "will arise or become payable in certain circumstances". Of course, if the envisaged circumstances never come to pass, the obligation will never arise or become payable. In other words, clause (i) comprehends an obligation that will arise on a condition that might never be met.

(e): "garnished obligation"

This is a definition of convenience, intended to avoid the necessity of having to refer repeatedly to "the obligation against which the garnishee summons has been issued".

(f): "garnishee summons amount"

The role of adjustment notices is explained in s. 132.

PART 8

GARNISHMENT

Definitions

117

(1) In this Part,

(a) "current obligation" means an *obligation*, or any portion of an *obligation*, that on the date of service of a garnishee summons is payable, payable on demand, or payable upon satisfaction of a condition to which section 148(1) applies;

(b) "deposit account" means a demand, time, savings passbook or similar account at a bank, treasury branch, trust company, credit union or similar organization, but does not include an account evidenced by an *instrument;*

(c) "employment earnings" means wages, salary, commissions or remuneration for work however computed;

(d) "future obligation" means an *obligation*, or any portion of an *obligation*, that is not a *current obligation* and that

(i) will arise or become payable in certain circumstances or at a certain time or times under an existing agreement or trust, an issued security or the will of a deceased *person*,

(ii) will arise or become payable in the ordinary course of events from an existing employment relationship,

(iii) is a *statutory obligation* that is likely to arise or become payable as a result of an event that has occurred,

(iv) may arise or become payable in respect of a fund of money that is in *Court*, or

(v) may arise or become payable in respect of an existing cause of action;

(e) "garnished obligation" means an *obligation* against which a garnishee summons has been issued;

(f) "garnishee summons amount" means

(i) the amount for which a garnishee summons was originally issued, if no adjustment notice has been served on the garnishee, or

Section 117(1)

(g): "joint entitlement"

The defined term is "joint entitlement", rather than "joint obligation", simply to emphasize that the obligation in question is owed to two or more persons jointly, rather than by two persons jointly.

(h): "net pay"

1. Reference: Recommendation 110.

2. It is important to note that this definition requires the calculation of net pay on a monthly basis. Moreover, in the interests of simplicity, the definition focuses on amounts that are payable in the month, rather than amounts that are earned in the month. Usually, employment earnings earned in a month are also payable in the month. However, it would be quite possible for employment earnings such as commissions to accrue over several months. In such a case, the commission earnings would be counted as part of the enforcement debtor's income for the month in which they are payable.

3. The garnishee's prescribed compensation is deducted in calculating net pay in the interest of simplifying the garnishee's calculation of what must be paid to the sheriff: see s. 139(7).

(i): "obligation"

The identical definition appears in s. 1(1). It is repeated here for ease of reference.

(k): "security"

Section 87(d) defines a "security" as any share or market security. "Share" is defined in section 87, while "market security" is defined in s. 1. The term "security" appears only once in this part: in s. 118(4).

Section 117(2)

1. Subsection (2)(a) would apply to such expressions as "existing agreement or trust", "deceased person", "issued share" and "existing cause of action".

2. Subsection (2)(b) is intended to deal with the situation where the agreement that existed between the enforcement debtor and the garnishee at the time the garnishee summons was served is replaced (whether innocently or otherwise) by a new agreement that gives rise to essentially the same obligation on the part of the garnishee.

Section 118

1. Subsection (1) is intended to establish the wide scope for garnishment proceedings under the JEA. Unless it is specifically made non-attachable by this or some other Act, any current or future obligation is subject to attachment.

(ii) the garnishee summons amount, as set out in the latest adjustment notice to be served on the garnishee.

(g) "joint entitlement" means an *obligation* that is or will be owed to two or more *persons* jointly;

(h) "net pay", for any month, means the total employment earnings payable by an employer to a person in that month, minus

(i) any amount that the employer is required by an Act of the Legislature of a province or the Parliament of Canada to deduct from such earnings, and

(ii) the amount that the employer is permitted to deduct as garnishee's compensation.

(i) "obligation" means a legal or equitable duty to pay money;

(j) "pay period" means a period at the end of which a person is entitled to be paid all or some portion of his *employment earnings* for that period;

(k) "security" has the meaning set out in section 87(d);

(l) "statutory obligation" means an *obligation* imposed by a statute or regulation.

(2) In subsection (1)(d),

(a) a reference to an existing state of affairs or to an event that has taken place refers to a state of affairs or event that is existing or that has taken place when the relevant garnishee summons is served on the garnishee, and

(b) a reference to an existing agreement includes an agreement that amends or replaces an agreement that was existing when the relevant garnishee summons was served on the garnishee.

ISSUING AND SERVICE OF GARNISHEE SUMMONS

Attachable obligations

118

(1) Except as otherwise expressly provided by this or any other Act, any *current obligation* or *future obligation* that is owed or that, if it arises, will be owed, by the garnishee to the *enforcement debtor*, is attachable by garnishment.

Section 118 (continued)

2. The obligation or obligations against which a garnishee summons is issued must be identified by the summons: see s. 117(b). Subsection (2) is intended to make it clear that a garnishee summons can identify and attach more than one obligation.

3. The purpose of subsection (3) is to avoid unnecessary confusion from multiple garnishments of the same obligation. So long as the original garnishee summons is in effect, all enforcement creditors of the enforcement debtor will benefit. The amount outstanding on the garnishee summons can be adjusted to take into account the registration of additional writs of enforcement in the Enforcement Registry: see s. 128.

Section 119

Reference: Recommendation 45.

Section 120

1. Reference: Recommendations 64, 66.

2. This section also corresponds roughly to Rule 470(3)(b).

3. It will be noted that clause (a) does not require the deponent to decide whether the obligation is a current or future obligation. The deponent will often not be in a position to determine this. Indeed, it will often simply be a matter of the timing of service of the garnishee summons as to whether it attaches a current or future obligation. The obligation in question might not have been payable when the summons was issued, but may have become payable by the time it is served on the garnishee.

Section 121

1. Reference: Recommendation 73.

2. The expiry date will be relevant only if the garnishee summons is issued against a future obligation, an obligation that is not payable when the summons is served. The effect of the expiry date is explained by ss 130 and 131.

Section 122

1. Reference: Rules 471(2),(4), 473.

2. The JEA allows most documents to be served in the manner set out in s. 185. Some of the methods of serving a document set out in s. 188 might not constitute good service of a statement of claim, and would not constitute service of a garnishee summons.

(2) A garnishee summons may be issued against more than one *obligation*.

(3) A garnishee summons may not be issued against an obligation in respect of which another garnishee summons issued under this Act is already in effect.

Obligations evidenced by instrument not attachable

119 An *obligation* evidenced by an *instrument* is not attachable by garnishment.

Initiating garnishment proceedings

120 An *enforcement creditor* may require a *sheriff* to issue a garnishee summons by delivering to the *sheriff* an affidavit in prescribed form

(a) stating that to the best of the deponent's belief, the garnishee is under a *current obligation* or *future obligation* to the *enforcement debtor*, and

(b) briefly stating the grounds for this belief.

Contents of garnishee summons

121 A garnishee summons shall be in prescribed form and shall

(a) be issued for the amount outstanding on all subsisting *writs* against the *enforcement debtor*,

(b) briefly describe the *obligation* or *obligation*s against which it is issued, and

(c) set out its expiry date, which shall be the anniversary of the date it is issued.

Service of garnishee summons

122

(1) A garnishee summons shall be served on the garnishee in the same manner as a statement of claim.

(2) If it appears that a *garnished obligation* is or may be payable through an office of the garnishee other than the office at which the notice is served,

(a) the latter office shall immediately notify the former of the garnishment, and

(b) so far as that particular *obligation* is concerned, the garnishee summons is deemed to have been served when the office through which the *obligation* is payable is notified in accordance with clause (a), or 48 hours after service of the garnishee summons in accordance with subsection (1), whichever is earlier.

Section 123

1. Reference: Rule 471(1).

2. This section actually serves two purposes. The first purpose is to say what the garnishee summons actually attaches. The garnishee summons attaches only the garnished obligation(s), that is, obligation(s), described in the garnishee summons. Suppose that D is employed by a financial institution, G, and also has funds in a deposit account with G. A garnishee summons served on G that identified only the obligation arising out of D's employment would not attach the obligation represented by the deposit account.

3. The second purpose of this section is to specify when the garnishee summons attaches these obligations: when it is served on the garnishee. Even if the garnished obligation is not yet payable, it is nonetheless attached upon service of the garnishee summons.

Section 124

Reference: Rule 475(1)(a).

Section 125

1. Reference: Recommendation 78.

2. The function of subsection (3) is similar to that of s. 117(2)(b). However, whereas the latter is concerned with agreements, the former is most likely to apply to a cause of action that the enforcement debtor has, or is at least alleged to have, against the garnishee. If, after service of a garnishee summons in respect of the cause of action, the enforcement debtor's action (or potential action) is settled, the settlement amount would be treated as an obligation attached by the garnishee summons.

(3) An *obligation* owed by a partnership carrying on business within Alberta may be attached, although one or more members of the partnership is resident out of Alberta, if the garnishee summons is served on the partnership within Alberta.

Obligations attached

123 A garnishee summons attaches the *garnished obligation* when the summons is served on the garnishee.

GARNISHEE'S DUTIES

Current obligation attached

124 Where a garnishee summons attaches a *current obligation*, the garnishee shall within 14 days of service of the summons pay to the *sheriff* the lesser of

(a) the amount payable by the garnishee to the *enforcement debtor* in respect of the attached *obligation*, and

(b) the *garnishee summons amount*.

Future obligation attached

125

(1) Where a garnishee summons attaches a *future obligation*, the garnishee shall within 14 days of service of the summons deliver to the *sheriff* a written statement

(a) stating the time or times at which the *obligation* is likely to be payable,

(b) stating the anticipated amount of the obligation, and

(c) describing any contingencies that must be satisfied before the *obligation* will arise or become payable.

(2) When a *future obligation* attached by a garnishee summons or any portion thereof becomes payable, the garnishee shall immediately pay to the *sheriff* the lesser of

(a) the amount payable by the garnishee to the *enforcement debtor* in respect of the attached *obligation*, and

(b) the *garnishee summons amount*.

(3) For the purposes of subsection (2) where an amount that may reasonably be regarded as consideration for the *enforcement debtor*'s foregoing the possibility of becoming entitled to a payment in respect of a *garnished obligation* is paid or becomes payable to the debtor, the amount so paid or payable is deemed to be an *obligation* attached by the garnishee summons.

Section 126

1. Reference: Recommendation 68; Rule 477.

2. In the context of attachment of employment earnings, this section must be read with s. 139(7), as well as with the definition of "net pay" in s. 117(1).

Section 127

1. Reference: Recommendation 78; Rules 475(1)(b),(d),(3), 476.

2. Subsection (4) may reflect an over-abundance of caution. It is intended to make it clear that whether a garnishee summons actually attaches a given obligation is not determined by whether the garnishee admits or denies the existence or "attachability" of the obligation.

Section 128

Reference: Recommendation 67.

Garnishee's compensation

126 A garnishee paying money to the *sheriff* may deduct a prescribed amount as compensation, but if the amount of the attached *obligation* is larger than the *garnishee summons amount*, the garnishee shall deduct the compensation from the balance owing to the debtor after payment to the *sheriff*.

Garnishee denying garnishable obligation

127

(1) A garnishee who

(a) disputes the existence of a *garnished obligation* or disputes the existence of circumstances from which it may arise,

(b) claims that a *garnished obligation* is not attachable, or

(c) claims that a *garnished obligation* is or may be owed to someone other than the *enforcement debtor*

shall, within 14 days of service of the summons, deliver to the *sheriff* a written statement setting out the grounds for the dispute or claim.

(2) A garnishee who claims that the garnished *obligation* is or may be owed to someone other than the debtor shall

(a) state the name and address of the *person* to whom the *obligation* is or may be owed,

(b) if the *obligation* is a *future obligation*, state the time or times at which it is likely to be payable, and describe any contingencies that must be satisfied before it will arise or become payable, and

(c) unless the *Court* otherwise orders, pay to the *sheriff* any amount that is or that becomes payable in respect of the *obligation*, up to the *garnishee summons amount*.

(3) A *sheriff* to whom a garnishee pays money pursuant to subsection (2) shall retain the money until the *Court* determines who is entitled to it.

(4) Delivery of a statement under subsection (1) does not affect the operation of the garnishee summons.

Disclosure of debtor's address

128

(1) When making a payment pursuant to section 124 or delivering a statement pursuant to section 125(1) or 127(1), the garnishee shall state the *enforcement debtor*'s last known address.

Section 129

1. Reference: Recommendation 67; ECA, s. 8(1)(a).

2. Where the garnishee summons attaches a future obligation, notice has to be given to the debtor only when the garnishee files his or her initial response. The enforcement debtor does not have to be served with notice every time money is paid to the sheriff by the garnishee.

3. The 10 day period referred to in s. 8(1)(a) of the ECA is changed to 14 days in subsection (2) in pursuit of our goal of standardizing time limits within the JEA as much as possible.

Section 130

1. Reference: Recommendation 73.

2. Every garnishee summons will contain the expiry date contemplated by clause (a): see s. 121. However, the expiry date will really only be relevant where the garnishee summons attaches a future obligation that does not become payable within one year of the date upon which the garnishee summons was issued.

3. Clause (c) contemplates a situation that could arise for two reasons. The first is that the garnishee has paid the full amount of the obligation to the sheriff, as required by the garnishee summons. In that case, nothing more will be payable, and it will not be possible for anything to become payable in respect of the attached obligation. The other possibility is that the relationship between the garnishee and the enforcement debtor under which an obligation might have become payable has come to an end without anything having become payable under it. In either case, saying that the garnishee summons is no longer "in effect" is really just a formality. Whether the garnishee summons remains in effect or not, it will have no practical effect if there is no possibility that anything (or anything further) will become payable in respect of the attached obligation.

4. The most likely reason for the sheriff to advise the garnishee that the summons is no longer in effect, as contemplated by clause (d), is that the enforcement debt has been satisfied through some other means.

Section 131

1. Reference: Recommendation 73.

2. It will be noted that the instructing creditor is not required to file an affidavit to have a replacement garnishee summons issued.

3. From two months before the existing garnishee summons expires until one month before it expires, the instructing creditor (ie, the creditor who caused the existing summons to be issued) has the exclusive right to issue a replacement garnishee summons. In the one month period before the expiry date of the existing summons, any enforcement creditor can cause the replacement garnishee summons to be issued.

(2) Where disclosure of the *enforcement debtor's* address would be unlawful or a breach of a legal duty owed by the garnishee to the debtor, the garnishee, instead of complying with subsection (1), shall deliver the garnishee summons and his response to the debtor, and certify to the *sheriff* that he has done so.

NOTICE TO ENFORCEMENT DEBTOR

Notice to enforcement debtor

129

(1) Upon receiving the garnishee's payment under section 124 or statement under section 125(1) or 127(1), the *sheriff* shall serve on the *enforcement debtor* a copy of the garnishee summons and either a statement of the amount received or a copy of the garnishee's statement.

(2) No money received pursuant to a garnishee summons is distributable until 14 days after the documents referred to in subsection (1) are served on the debtor.

CONTINUING ATTACHMENT

When garnishee summons in effect

130 A garnishee summons remains in effect until

(a) the expiry date set out in the summons,

(b) the garnishee pays the garnishee summons amount to the *sheriff*,

(c) nothing is payable, and it is not possible for anything to become payable, in respect of any attached *obligation*,

(d) the *sheriff* notifies the garnishee that the summons is no longer in effect, or

(e) the garnishment proceedings are terminated by order of the *Court*.

Replacement garnishee summons

131

(1) At any time during the 2 month period preceding the expiry date of a garnishee summons, the *instructing creditor* may by notice in writing require the *sheriff* to issue a replacement garnishee summons.

(2) Any *enforcement creditor* may require the *sheriff* to issue a replacement garnishee summons if the *instructing creditor* has not done so at least one month before the expiry date of an existing summons.

Section 131 (continued)

4. In subsection (3), it will be noted that the expiry date of a replacement garnishee summons is determined by the expiry date of the summons it replaces, not the date upon which the replacement summons is issued. Thus, each one of a continuing series of replacement garnishee summons will expire on the same day of the year. This should simplify diarization problems for both creditors and garnishees.

Section 132

1. In the case of a continuing attachment of a future obligation, it is important for the garnishee to know the maximum amount that must be paid to the sheriff. This is the amount of the subsisting writs against the debtor. This could easily change between the time that the garnishee summons is issued and the time that the attached obligation actually becomes payable. Thus, the sheriff is required to serve the garnishee with an adjustment notice where the amount of the subsisting writs changes.

2. Although the sheriff is obligated to notify the garnishee of a change in the amount of the writs within one month of the change, that might not be soon enough for an enforcement creditor, where the amount of outstanding writs has substantially increased (most likely, because a new writ has been registered in the Enforcement Registry). Thus, subsection (2) gives enforcement creditors the option of serving the adjustment notice, in which case the sheriff is not required to do so.

Section 133

1. Reference: Recommendation 82.

2. Subsection (2) would require the clerk to pay the money paid into court (up to the garnishee summons amount) to the sheriff, since that is what the clerk would have been required to do had the garnishee summons been issued against the money in court.

Section 134

1. Reference: Recommendation 81.

2. This section does not make the insurer directly liable for not paying attention to the garnishee summons, nor does it relieve the garnishee from obligations under the garnishee summons. However, if after receiving the relevant documents the insurer pays insurance monies directly to the enforcement debtor on behalf of the garnishee, the insurer will be liable to indemnify the insured (the garnishee) against liability under the JEA.

(3) The expiry date set out in the replacement garnishee summons shall be the anniversary of the expiry date of the garnishee summons it will replace.

(4) The replacement garnishee summons shall be served on the garnishee before the expiry date of the summons it is to replace, and takes effect when the earlier summons expires.

(5) When the replacement garnishee summons is served on the garnishee, the garnishee shall update the status of any contingency referred to in his response to the earlier summons.

Adjustment notices

132

(1) The *sheriff* shall serve an adjustment notice on a garnishee within 1 month of any change in the amount outstanding on subsisting *writs* against the *enforcement debtor*.

(2) Any *enforcement creditor* may serve an adjustment notice on a garnishee where the amount of the subsisting *writs* against the *enforcement debtor* changes.

(3) A *sheriff* is not required to serve an adjustment notice where the change in the amount of the *writs* is due only to the accrual of interest or where an *enforcement creditor* serves an adjustment notice in respect of the change pursuant to subsection (2).

(4) An adjustment notice shall be in prescribed form and shall state the new garnishee summons amount, which shall be the amount of all subsisting *writs* against the *enforcement debtor*.

(5) An adjustment notice may be served by ordinary mail.

Payment into Court in certain cases

133

(1) Where a cause of action has been attached, the garnishee may, upon filing the garnishee summons and any relevant adjustment notice with the Clerk of the Court, pay money into court pursuant to Rule 166 of the Alberta Rules of Court.

(2) If the *enforcement debtor* accepts the money paid into *Court* in satisfaction of his claim, the Clerk shall proceed as if the garnishee summons had been issued against the money in *Court*.

Notification of garnishee's insurer

134

(1) Where

(a) a cause of action in respect of which the garnishee has liability insurance has been attached, and

Section 135

1. Reference: Recommendation 77.

2. One obvious application of this section is where an enforcement debtor owns real property from which he derives rental payments. Quite likely, the enforcement debtor will be required to make mortgage payments, as well as payments for taxes and upkeep. The court could exempt the portion of the enforcement debtor's rental income necessary to meet these expenses.

3. Another possible application is where the enforcement debtor is in the process of performing a contract with the garnishee. It is quite possible that a large portion of the amount that will become payable to the enforcement debtor under the contract will be required to meet expenses incurred by the enforcement debtor in order to perform it. If the debtor can persuade the court that such expenses must be met out of the garnished obligation, the court may exempt an appropriate portion of the obligation from attachment.

4. Section 186(3)(f) would allow the court to impose any terms it considers appropriate to ensure that the exempt portion of the obligation is actually used for the purposes contemplated by this section.

Section 136

1. With the exception of section 135, the provisions referred to here all have to do with the garnishee summons amount. To ease the burden of calculations imposed on an employer who is served with a garnishee summons, the employer is not required to be concerned with the "garnishee summons amount". The employer-garnishee is simply required to deduct the enforcement debtor's calculated exemption from his or her calculated net pay, and pay the difference (if any) to the sheriff. The employer-garnishee does this until the sheriff tells the garnishee that the summons is no longer in effect.

2. Section 135 is the discretionary "golden goose" exemption. It is not appropriate for employment earnings, since there is a specific exemption for employment earnings: see s. 139 and Schedule A.

Section 137

1. Reference: Recommendation 88.

2. This section eases the burden of garnishment on employers by not allowing last minute garnishee summons to disrupt the payroll process. From the enforcement creditor's point of view, the availability of continuing attachment of employment earnings makes it unnecessary to serve a garnishee summons at the last possible moment before the enforcement debtor is paid to catch as much of his or her earnings as possible. A garnishee summons will capture employment earnings whether they are earned before or after service of the summons.

3. This section is intended to reduce the burden of garnishment on employers. If an employer does happen to pay money to the sheriff even though the relevant garnishee summons was not served the appropriate number of days before payday, there is no reason not to treat such a payment as having been regularly made in accordance with the garnishee summons. Thus, subsection (2) excludes the application of subsection (1) to such payments.

Section 138

1. Subsection (1) employs two concepts that are defined or explained elsewhere: net pay, and actual employment earnings exemption. "Net pay" is defined in s. 117(b). As explained in the comment relating to that definition, a debtor's net pay for any month is based on amounts payable during the month. In other words, net pay is calculated on a cash rather than an accrual basis. The enforcement debtor's actual exemption for the month depends on his or her net pay and the number of dependents. Once the debtor's net pay and actual exemption for the month are calculated, it is simply a matter of subtracting the latter from the former to get the amount, if any, payable to the sheriff.

(b) the garnishee has delivered the summons and any relevant renewal notice or adjustment notice to the insurer,

the insurer shall pay to the *sheriff* any amount, up to the *garnishee summons amount*, that the insurer would otherwise pay to the *enforcement debtor* on behalf of the garnishee.

(2) The insurer shall indemnify the garnishee in respect of any liability incurred by the garnishee under section 151 as a result of the insurer's failure to comply with subsection (1).

Discretion to preserve golden goose

135 Where the source of a garnished *future obligation* is *property* of the *enforcement debtor* or an agreement between the *enforcement debtor* and the garnishee, the *Court* may exempt from attachment as much of the *obligation* as is required by the *enforcement debtor* to keep or maintain the property or to meet *obligations* incurred in order to perform the agreement.

EMPLOYMENT EARNINGS

Inapplicable provisions

136 Sections 121(a), 124, 125(2), 130(b), 132 and 135 do not apply to garnishee summons issued against *employment earnings*.

Attaching earnings of current pay period

137

(1) Unless a garnishee summons issued against an *enforcement debtor*'s *employment earnings* is served on the garnishee

(a) at least 5 days before the end of a *pay period*, where the *pay period* is 10 days or less, or

(b) at least 10 days before the end of a *pay period*, where the *pay period* is more than 10 days,

the summons does not attach any amount ordinarily payable at the end of that period in respect of the debtor's *employment earnings*.

(2) Subsection (1) does not apply to any amount that the garnishee does in fact pay to the *sheriff*.

Calculation and payment of amount attached

138

(1) Subject to section 137, in any month during which a garnishee summons issued against *employment earnings* is in effect, it attaches the amount, if any, by which the *enforcement debtor's net pay* for the month exceeds his actual *employment earnings* exemption for the month.

Section 138 (continued)

2. It is quite common for employees to be paid more frequently than monthly. Subsection (2) attempts to simplify things for the garnishee in such cases. Payments to the sheriff are only required to be made at the end of each month (or, more precisely, at the end of the last pay period that ends during the month). Of course, the amount to be paid to the sheriff is calculated on the basis of the total amount payable to the enforcement debtor at any time during the month.

3. The purpose of subsection (3) is to require the garnishee to provide a statement of the information that will allow the sheriff (or an enforcement creditor) to confirm that the garnishee's calculation of the amount payable to the sheriff is accurate. Of course, the sheriff will only be able to check the accuracy of the calculations based on the information contained in the statement. It will not generally reveal inaccuracies in the raw data--such as the debtor's total earnings for the month--upon which the calculations are based.

Section 139

1. Reference: Recommendations 109-114; Rules 483(3), 484.

2. The amount determined under subsection (1) is deducted from the enforcement debtor's net pay to determine the amount to be paid to the sheriff: see s. 138(1).

3. Subsection (4) has the same purpose as Rule 483, in giving an enforcement debtor who is employed for only part of a month credit for the full minimum and maximum exemptions. It also makes it clear that the debtor is entitled to the full minimum and maximum exemptions where the garnishee summons is served too late in a pay period to catch the earnings payable for that period. If, for example, a garnishee summons is served too late to catch a mid-month advance, the debtor's net pay for the month will be based on the debtor's earnings for the latter half of the month. But the debtor will still be credited with the full minimum and maximum exemptions.

4. For the sake of simplicity, the debtor's minimum and maximum exemptions are based on the number of his or her dependents, as indicated on the TD1 form. It is assumed that a certain portion of the debtor's income must be devoted to the needs of such dependents. Also, the calculation of exempt income assumes that the debtor has only one source of employment income. These assumptions are necessary if the system of employment earnings garnishment is to operate with a minimum of judicial intervention. However, it goes without saying that situations will arise in which either or both of these assumptions are completely inappropriate. Recognizing this, subsection (5) allows the court to adjust the minimum and maximum exemptions to take into account the true circumstances.

(2) The *employment earnings* attached by a garnishee summons for any month shall be paid by the garnishee to the *sheriff* at the end of the *enforcement debtor*'s last *pay period* that ends during the month.

(3) At the end of the *enforcement debtor's* last *pay period* for each month during which a garnishee summons issued against *employment earnings* is in effect, the garnishee shall deliver to the *sheriff* a statement setting out

(a) the debtor's total *employment earnings* for *pay periods* that ended during the month,

(b) the number of the debtor's *dependants*, and

(c) the particulars of any amounts deducted in calculating the debtor's *net pay* for the month.

Partial exemption of employment earnings

139

(1) Subject to subsection (2), an *enforcement debtor's* actual *employment earnings* exemption for any month is the sum of

(a) his minimum exemption, and

(b) one half of any amount by which his *net pay* exceeds his minimum exemption.

(2) An *enforcement debtor*'s actual *employment earnings* exemption for any month shall not exceed his maximum exemption.

(3) An *enforcement debtor*'s minimum and maximum *employment earnings*' exemption for any month shall be determined in accordance with Schedule A.

(4) Where an *enforcement debtor* is employed for only part of a month, or where by virtue of section 137 a portion of the debtor's earnings for the month are not attached, the debtor's actual exemption shall be calculated on the basis of the full minimum and maximum exemptions for the month.

(5) Where

(a) a dependant or any member of the *enforcement debtor*'s household has an independent source of income or support, or

(b) the *enforcement debtor* earns employment income from more than one source

Section 139 (continued)

5. An extreme (and unlikely) example of the sort of situation contemplated by subsection (6) would be where the enforcement debtor is paid solely by commission, and all of the commissions earned during the year are paid on December 31. Since net pay is determined on a cash basis, all the commissions paid on December 31 would be attributed to the month of December. So, if the commissions earned during the year, net of the "statutory deductions", come to $40,000, and the debtor has no dependents, the maximum exemption would normally be $2400, and the amount payable to the sheriff would be $37,600. This would be an obvious case for the court to exercise its discretion to increase the minimum and maximum exemptions for the month of December to reflect that the debtor's net pay for December is really his or her earnings for the entire year.

6. To simplify the garnishee's calculations, the prescribed compensation is deducted from the enforcement debtor's employment earnings in calculating net pay: see s. 117(1)(h). If net pay so calculated exceeds the debtor's actual exemption, the garnishee's compensation is thus automatically deducted from the amount paid to the sheriff. However, if net pay turns out to be less than the debtor's actual exemption, so that nothing is payable to the sheriff, subsection (7) does not permit the garnishee's prescribed compensation to be deducted from the enforcement debtor's pay cheque.

Section 140

Reference: Recommendation 120.

Section 141

The effect of this section is that the enforcement debtor and a garnishee cannot defeat a continuing attachment by terminating the employment relationship one day, and then entering into a new employment contract the following day or the following week. This one day or one week gap would be ignored.

Section 142

1. Reference: Recommendation 70.

2. The purpose of notifying the joint obligees of the garnishment is to allow them to take any steps they wish to take to challenge the applicability of the presumption set out in s. 143.

Section 143

Reference: Recommendation 70.

the *Court* on application may reduce or eliminate the *enforcement debtor's* minimum, maximum or actual exemption applicable to any source of employment income.

(6) Where an *enforcement debtor's employment earnings* from a particular source vary substantially between months because the debtor is paid at intervals in excess of one month, or at irregular intervals or in irregular amounts, the *Court* on application may increase the minimum or maximum exemption for any particular month, so that the debtor's total exemptions over the course of the garnishment proceedings will approximate what they would have been if his *employment earnings* had been uniformly distributed over the relevant months.

(7) The garnishee's prescribed compensation shall always be included in the calculation of the amount attached by a garnishee summons, but may actually be deducted from the debtor's *employment earnings* only where the debtor's *net pay* exceeds his actual exemption.

Exemption for alimony or maintenance claims

140 The portion of an *enforcement debtor's employment earnings* that is *exempt* from, and the portion that is attached by, a garnishee summons issued upon a *judgment* for the payment of alimony or maintenance shall be determined in accordance with the *Maintenance Enforcement Act*.

Interruption of employment

141 An interruption of less than one month in an *enforcement debtor's* employment shall be ignored in determining the effect of a garnishee summons issued against the debtor's *employment earnings*.

JOINT ENTITLEMENTS

Notification of joint obligees

142

(1) Where a garnishee summons is issued against a *joint entitlement*, the garnishee's response to the summons shall include the names and addresses of the joint obligees other than the *enforcement debtor*, and the *sheriff* shall serve the garnishee summons on each joint obligee.

(2) Where disclosure of a joint obligee's address would be unlawful or a breach of a legal duty owed by the garnishee to the obligee, the garnishee, instead of complying with subsection (1), shall serve the garnishee summons on the obligee, and certify to the *sheriff* that he has done so.

Presumption of equal entitlement

143 Subject to section 144, an equal portion of any garnished *joint entitlement* is, for the purposes of this Part, deemed to be owed to each obligee individually.

Section 144

1. Reference: Recommendation 70.

2. It will be noted that to make an order under subsection (1), the court does not have to be convinced that the enforcement debtor is entitled to a larger portion of the joint entitlement than is presumed by s. 143. It has to be convinced only that he or she may be so entitled. The object of an order under this subsection is to get the money safely into the hands of the sheriff. Once the sheriff has the money, the matter of who is entitled to what portion can be determined by the court.

3. An application under subsection (3) is likely to be made in two situations. It might be made by an enforcement creditor to establish that the enforcement debtor does in fact have a greater interest in the joint entitlement than is presumed by s. 143. Such an application is likely to have been preceded by an *ex parte* application under subsection (1). On the other hand, an application under this subsection could be made by a joint obligee other than the enforcement debtor to establish that the enforcement debtor is not beneficially entitled to the portion of the obligation presumed by s. 143.

Section 145

1. Subsection (1) is intended to provide any joint obligee who wants to contest the attachment ample opportunity to do so.

2. Subsection (2) reflects the fact that an order under s. 144(1) can be made if the court concludes that the enforcement debtor might be beneficially entitled to a larger portion of the joint obligation than is presumed by s. 143. The "excess" portion should not be distributed to creditors unless it is established that the enforcement debtor is entitled to the excess portion.

Section 146

1. Reference: Recommendation 70.

2. Subsection (2) contemplates a situation such as this. D1 and D2 are enforcement debtors of C1 and C2, respectively. G owes money to D1 and D2 jointly. If C1 issues a garnishee summons against the joint entitlement and attaches the amount owed to D1, there is no reason why C2 should not be able to issue a garnishee summons against the portion owed to D2 without waiting for the one month period to expire.

Section 147

1. Reference: Recommendation 75.

2. In effect, this means that a garnishee summons catches only the funds that are in the deposit account at the time the summons is served.

Section 148

1. Reference: Recommendation 84.

2. Subsection (1) is based on the assumption that the sorts of conditions referred to can be disregarded without causing any prejudice to the deposit-taking institution. If, however, the institution can show that it would be prejudiced, subsection (2) allows the court to make whatever order is necessary to prevent such prejudice.

3. This section will not apply at all to any "account" in respect of which the institution in question has issued a negotiable instrument of some sort. Such an account would not fall within the definition of "deposit account" in s. 117(1), and, indeed, would not be an attachable obligation.

Determination of actual entitlement

144

(1) Where, on the application of an *enforcement creditor*, it appears that the *enforcement debtor* may be beneficially entitled to a larger portion of the *joint entitlement* than is presumed by section 143, the *Court* may require the garnishee to pay the larger portion to the *sheriff*.

(2) An application under subsection (1) may be made *ex parte*.

(3) On application by any interested *person*, the *Court* shall determine the actual beneficial interest of each obligee in a garnished *joint entitlement*, and grant relief accordingly.

Preconditions to distribution

145

(1) No money received by a *sheriff* in respect of a *joint entitlement* may be *distributed* until 1 month after it is received.

(2) No amount in excess of the portion of a *joint entitlement* attributed to the *enforcement debtor* by section 143 may be *distributed* unless it is established on an application on notice to the other obligees that the *enforcement debtor* is beneficially entitled to the excess amount.

Subsequent garnishment only with leave

146

(1) Where a garnishee summons is issued against a *joint entitlement*, no other garnishee summons may be issued against that entitlement except with leave of the *Court* until 1 month after the garnishee summons is served on every joint obligee.

(2) Subsection (1) does not apply if the garnishee summons are issued in respect of different *enforcement debtors*.

DEPOSIT ACCOUNTS

Only current obligations attachable

147 A garnishee summons issued against a *deposit account* does not attach any *future obligation* that may arise out of or become payable in respect of the *deposit account*.

Conditions to be disregarded

148

(1) For the purpose of determining whether a *deposit account obligation* has arisen or is payable, a condition of the account agreement that the account holder must apply in *person* to make, or give notice before making a withdrawal, or that any *person* making a withdrawal must present a pass-book or other document to the garnishee, shall be disregarded.

(2) The *Court* may on application make any order necessary to prevent a garnishee from being prejudiced by subsection (1).

Section 149

1. Reference: Recommendation 85.

2. This section serves a similar purpose to s. 144, but is not limited to deposit account obligations. Here, though, the presumption is that the condition applies unless the court orders otherwise.

Section 150

1. Reference: Recommendation 80.

2. Clause (b) would apply in the following sort of situation. G owes money to D. However, G has entered into a contract to perform services for D for a fee that G will be entitled to set off against the amount owed to D. A garnishee summons is served on G before he performs the contracted services. Although the fee has not yet been earned, it will be earned pursuant to a commitment entered into by G before service of the garnishee summons. Therefore, the fee, when earned, can be set off against the attached obligation.

Section 151

1. Reference: Recommendation 79.

2. This section is intended to emphasize that the relief granted against the garnishee should correspond to the nature of his or her sin. If the garnishee has failed to pay money to the sheriff that should have been paid, the appropriate remedy is likely to be a judgment for that amount. However, if the garnishee has simply failed to respond to a garnishee summons, and it turns out that nothing is in fact payable by the garnishee to the enforcement debtor, the appropriate remedy would probably be to award costs against the garnishee for any expense to which the enforcement creditor has been put in consequence of such failure.

CONDITIONAL OBLIGATIONS

Court's powers regarding conditions

149

(1) Where a *garnished obligation* will arise or become payable only upon the satisfaction of a condition, the *Court*, if satisfied that doing so will not prejudice the garnishee, may

(a) direct that the condition be disregarded or modified for the purposes of this Part,

(b) require the *enforcement debtor* to satisfy the condition, or

(c) authorize the *sheriff* or an *enforcement creditor* to do anything for the purpose of satisfying the condition that would otherwise have to be done by or with the authority of the *enforcement debtor*.

(2) An order under this section shall not shorten a period of time that otherwise must expire before the *garnished obligation* will arise or become payable.

GENERAL

Set-off

150 A garnishee is entitled to a set-off to which he would have been entitled in the absence of garnishment proceedings if

(a) the right to the set-off already exists when the garnishee summons is served,

(b) the right to the set-off arises after the garnishee summons is served, in consequence of a commitment entered into by the garnishee prior to service, or

(c) it would be inequitable not to allow the set-off.

Applications to enforce garnishee's duties

151

(1) Where a garnishee does not comply with any requirement of this Part, the *Court* may grant appropriate relief on the application of an *enforcement creditor*.

(2) Where a garnishee has failed to pay money to the *sheriff* as required by this Part, the *Court* may grant *judgment* against the garnishee for the amount that would have been distributable to *enforcement creditors* if the money had been duly paid to the *sheriff*, plus interest.

Section 152

1. Reference: Recommendation 67; Rules 470(5), 481(1).

2. Perhaps the most likely applicant under this section would be a third person who claims some sort of interest in the attached obligation. However, the enforcement debtor or the garnishee might also have reason to apply under this subsection.

3. Subsection (2) fulfils the same function as Rule 470(5). However, this subsection makes the criterion for setting aside the garnishee summons' actual or likely prejudice, rather than "substantial non-compliance".

Section 153

Reference: Rule 482.

Section 154

1. Reference: Recommendations 90-93, 99, 100.

2. Subsection (1) is intended to allow the court to fashion a remedy that is appropriate to the particular difficulty that is encountered. In some circumstances, the court may consider that the only effective solution is to appoint a receiver. In other situations, it may be that a simple order to the enforcement debtor to deliver up certain property to the sheriff will suffice. Sometimes, it may be necessary for the court to design a customized procedure for realizing a particularly exotic species of property.

3. The opening words of subsection (1) are intended to dispose of any artificial constraints that may have been placed on the granting of equitable relief in the past. The only prerequisite to the granting of an order under this section is a finding that the property in question cannot otherwise be conveniently realized.

4. Since the appointment of a receiver is likely to be a more intrusive mechanism for realizing property than are other possible mechanisms, subsection (2) sets out certain factors to be weighed in determining whether to appoint a receiver.

(3) A *judgment* under subsection (2) may be in the name of the creditor making the application but shall be for the benefit of all *enforcement creditors* who would have shared in the distribution if the money had been duly paid to the *sheriff*.

Setting aside garnishee summons

152

(1) Any interested *person* may apply to the *Court* for an order setting aside a garnishee summons, or to determine any issue that arises in the garnishment proceedings.

(2) A garnishee summons that is defective or irregular or that was issued on the basis of defective or irregular material shall not be set aside unless someone has been or is likely to be prejudiced by the defect or irregularity.

Discharge of obligation

153 A payment made by a garnishee in accordance with this part or on a judgment under section 152 discharges the garnishee, to the extent of the payment, as against the *enforcement debtor*.

PART 9

SPECIAL REMEDIES

Court may grant appropriate remedy

154

(1) Notwithstanding any rule of law or equity to the contrary, where certain *exigible property* of an *enforcement debtor* can not otherwise be conveniently realized, the *Court*, on the application of an *enforcement creditor* may

(a) appoint a receiver of the *property*,

(b) order the debtor or any *person* in possession or control of the *property* to deliver it to the *sheriff* or to another *person* named in the order,

(c) enjoin the debtor or any other *person* from disposing of or otherwise dealing with the *property*, or

(d) make any other or additional order that the *Court* considers necessary or appropriate to facilitate realization of the *property*.

(2) In determining whether to appoint a receiver under subsection (1)(a), the *Court* shall consider, but is not limited to considering,

Section 155

1. Reference: Recommendations 94, 95; PPSA, s. 65.

2. As indicated, this section is modelled on s. 65 of the PPSA. However, it has been modified to take into account certain facts regarding a receiver appointed under the JEA. They include the following: 1) here the receiver will always be appointed by the court; 2) often the receiver will be the sheriff; and 3) the receiver is appointed for the benefit of all enforcement creditors. These considerations are reflected in the adaptation of s. 65 of the PPSA to the JEA.

3. It will be noted that subsection (2) does not purport to confer any particular powers on the receiver. The receiver's powers will be those set out in the order of appointment.

4. The record keeping and reporting responsibilities set out in subsections (3) to (5) are similar to those imposed by the PPSA. However, the reporting requirements are simplified by only requiring the semi-annual and final statements to be filed in the Enforcement Registry, rather than having to be sent to various interested persons.

(a) the practicality of realizing the *property* through other proceedings authorized by this Act,

(b) the likelihood that appointment of a receiver would be an effective means of realizing the *property*,

(c) the probable cost of the receivership in relation to its probable benefit,

(d) the likelihood that appointment of a receiver would cause undue hardship or prejudice to the *enforcement debtor* or a third *person*, and

(e) the likelihood of the *writs* against the *enforcement debtor* being satisfied without resort to the *property* in question.

Appointment, powers, duties of receiver

155

(1) The *Court* may appoint a *sheriff* or any *person* who maintains a place of business in the Province to act as a receiver under section 154, and, in the case of a *person* other than a *sheriff*, may make the appointment conditional upon the provision of such security for the due performance of the receiver's duties as the *Court* considers proper.

(2) The *Court* may give a receiver appointed under section 154 such powers as the *Court* considers necessary or appropriate for the realization of the *property*, including, without limiting the generality of the foregoing, the power to manage, sell or bring any proceedings in relation to the *property*.

(3) Unless otherwise ordered by the *Court*, a receiver shall

(a) take into his custody and control the *property* over which he is appointed receiver,

(b) open and maintain a bank account in his name as receiver for the deposit of all money coming under his control as receiver,

(c) keep detailed records, in accordance with accepted accounting practices, of all receipts, expenditures and transactions involving the *property* over which he is appointed receiver,

(d) at least once in every 6-month period after his appointment register in the Enforcement Registry financial statements of his administration that, as far as is practical, are in the form required by section 149 of the *Business Corporations Act*,

Section 155 (continued)

5. Subsection (6) emphasizes that the receiver is acting for all enforcement creditors. The proceeds of the receivership must be paid over to the sheriff, who distributes them in the same manner as the proceeds of any other enforcement process.

Section 156

(a): "dependent"

This definition turns on the factual question of whether the enforcement debtor is responsible for a particular person's maintenance or support.

(c): "home"

Occupation by the owner is essential if a parcel of land is to be regarded as a home for the purposes of this part.

(e) on completion of his duties, register in the Enforcement Registry a final account of his administration in the form referred to in clause (d).

(4) The *enforcement debtor*, an *enforcement creditor*, or a *sheriff* may, by a demand in writing served on the receiver, require the receiver to make available for inspection the records referred to in subsection (3)(c) during regular business hours at the place of business of the receiver in the Province.

(5) The receiver shall comply with a demand under subsection (4) not later than 14 days from the date of receipt of the demand.

(6) A receiver other than a *sheriff* shall promptly remit to a *sheriff* any money realized through the receivership that is not necessary to meet the receiver's fees and expenses.

(7) On the application of any interested *person*, the *Court* may

(a) remove, replace or discharge a receiver;

(b) give any direction on any matter relating to the duties of a receiver;

(c) approve the accounts and fix the remuneration of a receiver.

(8) The powers referred to in subsection (7) are in addition to any other powers the *Court* may exercise in its jurisdiction over receivers.

PART 10

EXEMPTIONS

Definitions

156 In this Part,

(a) "dependant" means a *person* for whose maintenance or support an *enforcement debtor* is responsible, or for whose maintenance or support a deceased *enforcement debtor* was responsible at the time of his death;

(b) "farm" means *land* used primarily for the purpose of producing *agricultural products*;

(c) "home", except in relation to a *mobile home*, means a parcel of *land* occupied by its owner as his ordinary residence;

Section 156

(d): "home quarter"

Since this definition itself employs the defined term "home", the effect of this definition is that a quarter section is a "home quarter" only if the quarter section is part of a farm, and the enforcement debtor is a farmer who occupies the land in question as his ordinary residence.

(e): "mobile home"

This definition relies on the definition of "mobile home" in s. 1(1). Thus, a "mobile home" for the purposes of this part is a mobile home, as defined by s. 1(1), occupied by its owner as his or her ordinary residence.

Section 157

1. Reference: Recommendations 100, 101, 103, 104, 105, 106; *Exemptions Act*, s. 1(1)(a), (b), (c)(i), (f).

2. The major change here from the equivalent *Exemptions Act* provisions is the removal of the "use in trade or calling" restriction on the automobile exemption, combined with the reduction in the value of the automobile exemption to $3,000.

Section 158

Reference: Recommendation 102.

(d) "home quarter" means a *home* of one quarter section or less that is part of a *farm* and that is occupied by a *person* whose primary occupation is farming;

(e) "mobile home" means a *mobile home* occupied by its owner as his ordinary residence.

Basic necessities

157 The following *property* of an *enforcement debtor* is *exempt*:

(a) food required by the *enforcement debtor* and his *dependants* during the next 12 months;

(b) the necessary clothing of the *enforcement debtor* and his *dependants*;

(c) household furnishings and appliances to the value of $4000;

(d) one automobile, to the value of $5000;

(e) medical and dental aids required by the *enforcement debtor* or his *dependants*;

(f) items of sentimental value to the *enforcement debtor*, to the value of $500.

Shelter

158

(1) One of the following is *exempt*:

(a) the *enforcement debtor*'s *home quarter*; or

(b) the *enforcement debtor*'s *home* or *mobile home*, to the value calculated in accordance with subsection (2).

(2) The value referred to in subsection (1)(b) is

(a) $40,000 for a *home* or $20,000 for a *mobile home*, if the *enforcement debtor* is the sole owner of the *home* or *mobile home*, or

(b) the amount set out in clause (a) multiplied by the *enforcement debtor*'s proportionate ownership share, if the debtor is a co-owner of the *home* or *mobile home*.

(3) For the purposes of subsection (2)(b), in the absence of evidence to the contrary, co-owners are presumed to share equally.

Section 159

1. Reference: Recommendation 108; *Exemptions Act*, s. 1(1)(h), (i).

2. It will be noted that references to "books of a professional person" and "necessary tools and necessary implements and equipment" in the *Exemptions Act* have been generalized to a reference to personal property. The crucial point is that the personal property, whatever it is, must be used to earn income from an occupation.

Section 160

1. Reference: Recommendation 107; *Exemptions Act*, s. 1(1)(c), (d), (g).

2. This is very similar to the corresponding provisions of the *Exemptions Act*. There are some minor terminological changes, such as the use of the defined term "agricultural products" in clause (a).

Section 161

1. Reference: Recommendations 102, 104, 108, 129, 147.

2. Subsection (1) is intended to make it clear that enforcement proceedings can be taken against an item such as a home or an automobile whose value exceeds the value of the exemption for that kind of property.

3. Clause (2)(b) deals with the scenario described in the report, where the enforcement debtor has granted a security interest (such as a mortgage) in partially exempt property (most likely, an urban home) after the property has been bound by a writ. In such a case, rather than paying the value of the exemption to the debtor the sheriff pays it into court. As between the enforcement debtor and the holder of the subordinate security interest, it is likely that the latter will be entitled to this fund. But that issue can be sorted out once the fund is paid into court.

Livelihood

159 Where the *enforcement debtor*'s primary occupation is not farming, *personal property* to the value of $10,000 used by the debtor to earn income from his occupation is *exempt*.

Farm exemptions

160 An *enforcement debtor* whose primary occupation is farming is entitled to the following exemptions:

(a) *agricultural products* sufficient in themselves or when converted into cash to provide

(i) food and other necessities of life required by the *enforcement debtor* and his *dependants* for the next 12 months,

(ii) payment of money borrowed or debts incurred by the *enforcement debtor*

(A) in growing and harvesting his current *crop*, or

(B) during the preceding period of 6 months, for the purpose of feeding and preparing his livestock for market,

(iii) payment of current taxes and one year's arrears of taxes or in case taxes have been consolidated, one year's instalment of the consolidated arrears, and

(iv) the necessary cash outlays for the ordinary farming operations of the *enforcement debtor* during the next 12 months and the repair and replacement of necessary *farm* equipment during the same period;

(b) the *farm* equipment and vehicles necessary for the proper and efficient conduct of the *enforcement debtor*'s agricultural operations for the next 12 months;

(c) seed grain sufficient to seed the *enforcement debtor*'s *land* under cultivation.

Proceeds exempt

161

(1) Where *property* of a certain description is *exempt* to a stated value, *property* of that description whose realizable value exceeds the stated value is *exigible*.

(2) Where *property* to which subsection (1) applies is sold in *enforcement proceedings*, before *distributing* any of the proceeds under Part 11, the *sheriff* shall

Section 161 (continued)

4. Subsections (4) and (5) preserve the proceeds in the hands of the enforcement debtor for a limited period The idea here is that the enforcement debtor should be given time to reinvest the proceeds in a more modes version of the item that was sold.

Section 162

1. Reference: Recommendation 131; *Exemptions Act*, s. 6.

2. The exception at the beginning of subsection (2) concerns items of sentimental value to the debtor. Fo obvious reasons, the sheriff can hardly be expected to make a selection of items that are of sentimental value t the debtor.

Section 163

Reference: Recommendation 130; *Exemptions Act*, s. 5.

Section 164

Reference: Recommendation 128.

(a) pay the stated value of the exemption to the *enforcement debtor*, or

(b) if the *property* was subject to a subordinate security interest or encumbrance, pay the stated value of the exemption into *Court*, and give notice of the payment in to the *enforcement debtor* and to the secured creditor or encumbrancer.

(3) Subsection (2) does not apply

(a) to *property* described in section 157(f), or

(b) where the *enforcement debtor* has other *property* of the same description that exhausts the relevant exemption.

(4) Unless money paid to the *enforcement debtor* pursuant to subsection (2) or pursuant to section 168(3) is intermingled with other funds of the debtor, the money and any deposit account into which it is paid are *exempt* for 6 months, if it represents the proceeds of sale of the *enforcement debtor's home* or *mobile home*, or 2 months in any other case.

(5) Where an *enforcement debtor* sells *exempt property*, or *property* that is *exempt* to a stated value, subsection (4) applies with any necessary modifications to the proceeds of sale.

Selection

162

(1) Where *property* of a certain description is *exempt* up to a stated value or other limit and the *enforcement debtor* or the debtor's estate owns more items of that description than are actually *exempt*, the debtor or, if the debtor is deceased, the debtor's *dependants*, may select the items to which the exemption will apply.

(2) Except in the case of *property* described in section 157 (f), the *sheriff* shall make the selection referred to in subsection (1) if for any reason the debtor or the debtor's *dependants* are unable or unwilling to do so.

Survival of exemptions

163 So long as it is required for the maintenance and support of a deceased *person's dependants*, *property* that would be *exempt* if the deceased *person* were alive remains *exempt* in any *enforcement proceedings* against that *person*'s estate.

Determining exempt status

164 An issue as to whether certain *property* is *exempt* shall be determined on the basis of the circumstances existing at the time the issue is determined.

Section 165

1. Reference: Recommendation 127.

2. Of course, this provision is not intended to prevent, and would not prevent, holders of security interest in property that would be exempt from enforcement proceedings under the JEA from enforcing their security interests. "Exempt" means not subject to enforcement proceedings under the JEA: see s. 1(1). A secured party who enforces the security interest does not do so "under the JEA".

Section 166

Reference: Recommendations 117, 118, 120; *Exemptions Act*, s. 1(2); *Seizures Act*, s. 46(2).

Section 167

1. Reference: Recommendation 136.

2. Subsection (1) envisions two possibilities. The first is that enforcement proceedings taken under the JEA--seizure, garnishment, receivership, or whatever--directly result in the receipt of money by the sheriff. The other possibility, to which the phrase "otherwise received by a sheriff as a result of the existence of an enforcemen debt" is directed, is that the sheriff receives money even though no active enforcement proceedings have been initiated under the JEA. A direct payment by the enforcement debtor to the sheriff would fall into this category as would the remittance of surplus funds realized upon the enforcement of a security interest, as required by clause (2)(b).

3. The purpose of subsection (2) is to make sure that a surplus resulting from the realization of a prior security interest is available for distribution to enforcement creditors.

4. Sometimes, security interests in property are realized through the sheriff's office. This is the situation contemplated by clause (2)(a). If the proceeds of sale of the collateral are more than sufficient to discharge the security interest, the surplus funds will end up in the hands of the sheriff. Clause (a) is intended to make it clear that the distribution mechanics of this part apply to that surplus.

5. Security interests are often enforced through the appointment of a receiver, who then disposes of the collateral. If the distribution mechanics of this part are to apply to any surplus that results from a receivership the first order of business is to get that surplus into the hands of a sheriff. That is the function of clause (2)(b) which requires the person selling the collateral to pay the surplus to the sheriff. Since that money will have been paid to the sheriff, "as a result of the existence of an enforcement debt", subsection (1) requires it to be distributed in accordance with this part.

6. The mechanics of distribution set out in this part assume that the potential claims against money in the hands of the sheriff are claims of "participants" in the enforcement process: enforcement creditors, sheriffs, and enforcement debtors. It does not deal with proprietary claims of third parties against money in the hands of the sheriff. Subsection (3) is intended to make it clear that such proprietary claims are not prejudiced by the distribution mechanics of this part. For example, if money in the hands of a sheriff represents the proceeds of sale of a chattel that was subject to a security interest that has priority over any relevant writ, this part would apply only to the surplus, if any, remaining after satisfaction of the secured claim.

No waiver

165 A provision of an agreement by which a *person* waives any exemption given by this Act is void.

Exceptions

166 The exemptions set out in this Part do not apply

(a) where the *enforcement debtor* is a corporation or partnership,

(b) to *enforcement proceedings* on a *judgment* for the payment of maintenance or alimony,

(c) to *property* that the *enforcement debtor* has abandoned, or

(d) to *enforcement proceedings* on a *money judgment* arising out of an act for which the *enforcement debtor* has been convicted of an offence under the Criminal Code (Canada).

PART 11

DISTRIBUTIONS

Application to all enforcement proceeds

167

(1) All money realized through *enforcement proceedings* or otherwise received by a sheriff as a result of the existence of an *enforcement debt* shall be dealt with in accordance with this Part.

(2) Where *property* bound by a writ is sold in proceedings to enforce a prior security interest or encumbrance,

(a) if the *property* is sold by a *sheriff*, this Part applies to any portion of the proceeds that exceeds the amount necessary to discharge the security interest or encumbrance, and

(b) if the *property* is sold by a *person* other than the *sheriff*, that *person* shall pay to the *sheriff* any portion of the proceeds that exceeds the amount necessary to discharge the security interest or encumbrance.

(3) Nothing in this Part prejudices any right to money in the hands of a *sheriff* that is based on a prior security interest or other prior proprietary interest in the money, or in the *property* from which the money is derived.

Section 168

1. This section recognizes that sheriffs will not infrequently receive sums of money that represent the proceeds, or a portion of the proceeds, of sale of an item that would have been exempt from proceedings initiated by an ordinary enforcement creditor of the enforcement debtor. The most likely source of such funds is sale o exempt property at the behest of a secured party, such as the sale of an enforcement debtor's home at the instance of a mortgagee. Another source of such funds is where enforcement proceedings are initiated by a "maintenance creditor", in which case the normal exemptions do not apply. In either of these cases, special provision must b made for the distribution of the proceeds in question.

2. Subsection (2) requires that if there is a subsisting writ of a "maintenance" or "victim of crime" creditor money received in the circumstances described by subsection (1) must be applied, in the first instance, on accoun of those writs. This is because the relevant exemptions do not apply to such writs.

3. If there are no writs belonging to "maintenance" or "victim of crime" creditors, or there is a surplus remaining after payment of such creditors, the normal rule regarding the proceeds of exempt property applies If the property in question would have been totally exempt from enforcement proceedings (eg, the home quarter) all of the proceeds remaining in the sheriff's hands must be paid to the enforcement debtor. However, if the property in question was exempt only up to a certain value (eg, a non-farm home, or an automobile), the enforcement debtor is entitled to the lesser of the amount remaining in the sheriff's hands, or the maximum value of the exemption.

4. If, after all this, there is money remaining in the sheriff's hands, subsection (4) provides for its distributio to "ordinary" enforcement creditors.

Section 169

1. Reference: Recommendation 141.

2. The point in time at which a distributable fund is constituted is important, because that is when the identity and amount of eligible claims against the fund are fixed: see s. 170(3). A writ registered in the Enforcement Registry after a distributable fund is constituted would not share in a distribution, even if the fund had not actually been distributed before the writ was registered.

Money derived from exempt property

168

(1) This section applies to money received by a *sheriff*

(a) pursuant to section 167(2) as a result of the enforcement of a security interest or encumbrance in or against *exempt property*, or *property* that is *exempt* up to a stated value, or

(b) in consequence of proceedings to enforce a *judgment*

(i) for the payment of alimony or maintenance, or

(ii) arising out of an act for which the *enforcement debtor* was convicted of an offence under the Criminal Code (Canada)

against *property* that would otherwise be *exempt*, or *exempt* up to a certain value.

(2) Where there is an amount outstanding on a subsisting *writ* based on a *judgment* described by subsection (1)(b), the money received by the *sheriff* shall be applied against

(a) the amount outstanding on the *writ*, and

(b) any sheriff's fees or expenses for which the relevant *enforcement creditor* is liable and which are not included in the amount outstanding on the *writ*.

(3) Where there is money remaining in the *sheriff's* hands after any payment required by subsection (2), the *sheriff* shall pay to the *enforcement debtor* the lesser of

(a) the amount remaining in the *sheriff's* hands, and

(b) the maximum value of the exemption for the *property* from which the money was derived.

(4) Any money remaining in the *sheriff's* hands after the payment required by subsection (3) constitutes a distributable fund.

When distributable fund constituted

169

(1) Subject to subsections (2) and (3), any money to which this Part applies constitutes a distributable fund as soon as it is received by a *sheriff*.

Section 169 (continued)

3. Generally, funds are distributable by the sheriff as soon as they are received, but subsection (2) recognize that there are certain circumstances in which a sheriff who receives funds as a result of enforcement proceeding must wait a certain period before distributing those funds. In each case, the "waiting period" is intended to allo certain persons who may possibly have an interest in the funds to take steps to protect their interests. [Th relevant provisions are s. 85(3) (expeditious sales of seized property), s. 129(2) (amounts received by the sherif pursuant to a garnishee summons), and s. 145 (amounts received by sheriff pursuant to garnishment of a joi entitlement).] In these cases, the distributable fund is not constituted until the waiting period expires.

Section 170

1. Reference: Recommendation 141.

2. The function of this section is to define the sorts of claims that can be considered in a distribution of distributable fund. Section 171 then deals with the payment of those claims where the amount of the fund exceed the amount of the claims, and s. 172 deals with the situation where the amount of the claims exceeds the amoun of the fund. Obviously, it is only in the latter situation that there is any need to be concerned about prioritie between claims.

3. The aim of subsection (2) is to allow a sheriff who has a distributable fund to identify and calculate th amount of eligible claims against the fund on the basis of information that is readily available to the sheriff, mos likely because it is registered in the Enforcement Registry.

4. The relationship between clauses (2)(a) and (2)(b) can best be appreciated by referring back to s. 37, whic describes how the amount outstanding on a subsisting writ is calculated. Referring to s. 37(2)(a), it will be see that amounts that an enforcement creditor has paid to a sheriff in respect of the latter's fees or expenses wil automatically be credited to the amount outstanding on the writ. However, it is conceivable that at the time sheriff receives a distributable fund, the sheriff will have incurred expenses that have not been paid by th enforcement creditor. For example, if the distributable fund is the result of the sale of seized property that wa in storage before it was sold, the sheriff may have incurred storage charges that have not yet been billed to, muc less paid by, the enforcement creditor. Clause (2)(b) would apply to such storage charges.

5. Clause (2)(c) will rarely be relevant: see the comments pertaining to s. 173(2).

6. As previously noted, subsection (3) fixes both the identity and the amount of eligible claims as of the dat the fund is constituted.

Section 171

The "other persons" contemplated by this section would include a person who had a subordinate interest subordinate to the relevant writs - in the property from which the distributable fund was derived.

Section 172

1. Reference: Recommendation 144; ECA, s. 12.

2. Referring to clauses (a)-(c), it will be noted that it is only expenses and costs incurred in connection wit the enforcement measures that have produced the distributable fund that are entitled to any sort of priority. Any other costs, to the extent they are included in an eligible claim, are dealt with by clause (g).

(2) Where this Act requires that money received by a *sheriff* not be *distributed* before a certain period elapses or a certain event occurs, the money constitutes a distributable fund as soon as the period elapses or the event occurs.

(3) Money payable in accordance with section 161(2), or section 168(2) or (3) does not constitute or form part of a distributable fund.

Eligible claims

170

(1) A distributable fund shall be paid out to the holders of eligible claims in accordance with section 171 or section 172.

(2) The following are eligible claims against a distributable fund:

(a) the amount outstanding on subsisting *writs* against the *enforcement debtor;*

(b) *sheriffs'* fees and expenses earned or incurred in connection with *enforcement proceedings* against the *enforcement debtor* and not otherwise included in an eligible claim;

(c) costs that the *Court* has directed to be paid out of the fund pursuant to section 173(2), if not otherwise included in an eligible claim.

(3) Subject to section 173(2), eligible claims against a distributable fund shall be identified and the amount of each claim fixed as of the date the fund is constituted.

Fund exceeds eligible claims

171 Where the amount of a distributable fund is equal to or greater than the amount of the eligible claims against it, the *sheriff* shall pay the claims immediately, and then pay any remaining balance to the *enforcement debtor*, or to such other persons as may be entitled thereto.

Eligible claims exceed fund

172 Where the amount of the distributable fund is less than the amount of the eligible claims against it, the *sheriff* shall apply the fund towards the claims in the following order of priority:

(a) if the fund is proceeds of sale of a crop, any charge for harvesting or marketing expenses to which a *sheriff* or *enforcement creditor* is entitled under section 104;

(b) other fees and expenses of a *sheriff* earned or incurred in connection with the enforcement measures that have produced the fund;

Section 172 (continued)

3. The purpose of clause (d) is explained in the comments for s. 173.

4. An example of a claim to which clause (e) might apply is the claims of wage earners that are given a priority by the *Employment Standards Act*.

5. Clause (f) implements Recommendation 144, regarding the preferred payment to the active creditor.

6. Ordinarily, the only provisions likely to be applicable are clauses (b), (c), (f) and (g). Clauses (a), (d) and (e) deal with relatively unusual situations.

Section 173

1. Reference: ECA, ss 33, 35.

2. Proceedings under s. 77(6) of the JEA are similar to interpleader proceedings, except that they are initiated by an enforcement creditor, rather than the sheriff. The rationale behind s. 33 of the ECA, and this section, is that if no creditors were prepared to foot the bill for the proceedings in question, there would be no money to be distributed to any enforcement creditor. Therefore, it is only fair that the creditors who do contribute to the costs of the proceedings should get some benefit from doing so.

3. The phrase in subsection (1), "to the extent that they are not entitled to a higher priority", contemplates that an enforcement creditor who has contributed to the cost of interpleader proceedings may also have incurred costs for which he or she is entitled to a priority under clause (a), (b) or (c) of s. 172.

4. Subsection (2) gives a discretion to the court regarding the payment of costs of interpleader or s. 77(6) proceedings out of a distributable fund. This is somewhat different than s. 35 of the ECA, which simply makes such costs a first charge on the proceeds, without any reference to the court. Given the variety of circumstances in which such proceedings can arise and such costs can be incurred, it seems appropriate to leave this matter to the discretion of the court.

5. It will be noted that if the court does order the costs to be paid out of the distributable fund, s. 172(c) puts them on the same priority footing as costs incurred by the instructing creditor in connection with the enforcement measures that have produced the distributable fund in question. The rationale for equating such costs to each other is that both sorts of costs can be said to have been necessarily incurred to produce the distributable fund. There is therefore no particular reason for giving one sort of costs priority over the other.

Section 174

Reference: ECA, s. 31(1)-(6).

(c) other costs incurred by the *instructing creditor* in connection with the enforcement measures that have produced the fund, and any other costs that the *Court* has directed to be paid out of the fund;

(d) claims referred to in section 173(1);

(e) claims that by virtue of any other Act are entitled to priority over the claims of enforcement creditors generally;

(f) the balance of the *instructing creditor*'s claim, up to an amount not exceeding 15% of the balance of the fund remaining after payments under clauses (a) to (e);

(g) all other eligible claims, including any unpaid balance of the *instructing creditor*'s claim, on a *pro rata* basis.

Fund produced or preserved through court proceedings

173

(1) Where interpleader proceedings or proceedings pursuant to section 77(6) are taken by a *sheriff* or *enforcement creditor*, the eligible claims of creditors who agree to contribute *pro rata* to the cost of contesting the adverse claim, to the extent that they are not entitled to a higher priority, have priority under section 172(d) with respect to any portion of a distributable fund that results from or is preserved by the proceedings.

(2) The *Court* may direct that insofar as the costs, including solicitor and client costs, of proceedings referred to in subsection (1) are not paid by an adverse party, such costs shall be paid out of a distributable fund that results from or is preserved by the proceedings.

Statement of proposed distribution

174

(1) Where the amount of the eligible claims exceeds the amount of the distributable fund, the *sheriff* shall prepare a distribution statement in prescribed form, and serve it on the *enforcement debtor* and every *enforcement creditor*.

(2) A *person* affected by the proposed scheme of distribution may contest it by delivering to the *sheriff* a notice in writing stating his objection to the scheme.

(3) If no objection is made within 14 days after a distribution statement has been served on every *person* entitled to receive one, or within any further time that the *Court* may allow, the statement is final and conclusive as between all *persons* and the *sheriff*, and the *sheriff* shall immediately *distribute* the fund pursuant to the statement.

Section 175

This section would apply where C1 is an enforcement creditor of D, but is also the enforcement debtor of C2. If the sheriff gets money that is payable to the enforcement creditors of D, the share that would normally go to C1 is treated as having been received on account of C1's enforcement debt. Hence, C1's share of the enforcement proceedings against D is distributed by the sheriff to C1's enforcement creditors (ie, C2).

Section 176

1. Reference: Recommendations 157, 158.

2. Subsection (1) is based on the premise that it is unnecessary for the assurance fund to have a separate, physical existence. The assurance fund levy could in face be paid into the General Revenue Fund, and the assurance fund would exist as an account within the General Revenue Fund.

3. It is anticipated that, in accordance with Recommendation 158, the regulations will prescribe a three-tiered system of fees for filing writs. As indicated by subsection (3)(b), it is also anticipated that the amount of the levy will be adjusted from time to time to reflect the actual needs of the assurance fund. These adjustments need not necessarily be upwards.

4. Subsection (5) contemplates a situation that is not likely to occur. If it did occur, consideration would no doubt be given to increasing the amount of the assurance fund levy.

(4) If an objection to the proposed distribution is made, the *sheriff* shall *distribute* as much of the fund as will not prejudice the effect of the objection.

(5) Unless within 14 days of making the objection the objector applies to the *Court* for a determination of the matter in dispute, the objection is deemed to be abandoned.

Claimant is an enforcement debtor

175 Notwithstanding anything else in this Part, where there is a subsisting *writ* against an *enforcement creditor* who is entitled to a share of any money received by the *sheriff*, the *sheriff* shall deal with that share as money received on account of the *enforcement debt* owed by the *enforcement creditor*.

PART 12

COMPENSATION FOR LOSS

Assurance fund

176

(1) The Provincial Treasurer shall keep an account within the General Revenue Fund in respect of the *assurance fund* referred to in this Part.

(2) A prescribed portion of the fee for registering a *writ* in the Enforcement Registry shall be credited to the *assurance fund*.

(3) The prescribed fee for registering a *writ*, and the portion of the fee to be credited to the *assurance fund*,

(a) may reflect the amount of the *writ*, and

(b) may be adjusted from time to time in order to maintain the balance of the fund at a level considered sufficient to meet anticipated liabilities.

(4) The Provincial Treasurer may authorize payment or settlement of any claim that is made against the *assurance fund*.

(5) If the *assurance fund* becomes liable for an amount in excess of its balance,

(a) the excess amount may be paid out of amounts subsequently credited to the *assurance fund*, or

Section 177

1. Reference: Recommendations 150, 159.

2. The purpose of subsection (1) is to bring claims for compensation as a result of mishaps in the enforcement process within the scheme set out in this part. More specifically, it has the effect of requiring an injured party to look to the assurance fund for compensation, rather than bringing an action against, say, a sheriff or an enforcement creditor.

Section 178

1. Reference: Recommendations 151-154.

2. Section 78(1) creates a sort of estoppel against a third person who is given notice of the seizure of property in which he or she might have an interest, and who does not then promptly assert a claim to the property.

3. Subsection (2)(a) does not contain any requirement that the seizure or sale be unauthorized, or in breach of the JEA. For example, s. 63(2) authorizes a sheriff to seize "any property in which there are reasonable grounds for believing the enforcement debtor has an exigible interest". A sheriff might well, on the basis of such a reasonable belief, seize property that turns out to belong to some third party, and in which the debtor has no exigible interest at all. If that happens, and the person who owns the property suffers actual pecuniary loss as a result of the seizure, the assurance fund is liable, even though the sheriff's action was actually authorized by the JEA.

4. Note however, that the third person must suffer some pecuniary loss. A "wrongful" seizure of a third person's property gives rise to no cause of action unless he or she suffers some actual pecuniary injury. This requirement of pecuniary injury is also present in ss 179 and 180.

Section 179

Reference: Recommendations 151, 155.

Section 180

Reference: Recommendations 151, 156.

(b) the Provincial Treasurer may authorize the excess amount to be paid out of the General Revenue Fund, in which case the amount so paid shall be reimbursed out of amounts subsequently credited to the *assurance fund*.

Cause of action only if provided by Act

177

(1) Except as expressly provided by this Act, no *person* has any cause of action whatsoever in respect of

(a) any interference or dealing with *property* by a *sheriff* acting, or purporting to act, under the authority of this Act, or

(b) the improper performance or the non-performance of any of the *sheriff's* duties under this Act.

(2) Nothing in this section prevents a *person* from bringing proceedings to recover possession of *property* to which he is entitled.

Loss suffered by third persons

178

(1) In this section "third person" means a *person* other than

(a) the *enforcement debtor*, or

(b) an *enforcement creditor*.

(2) Subject to section 78(1), the *assurance fund* is liable for pecuniary loss suffered by a third *person* as a result of

(a) the seizure, detention or sale by a *sheriff* of *property* in which the third *person* has an interest that is not subordinate to any relevant *writ*,

(b) damage to *property* in which he has an interest caused by a *sheriff* in the course of *enforcement proceedings*, or

(c) the failure of a *sheriff* to comply with any provision of this Act.

Loss suffered by enforcement debtors

179 The *assurance fund* is liable for pecuniary loss suffered by an *enforcement debtor* as a result of non-compliance with this Act by a *sheriff* or *enforcement creditor*.

Loss suffered by enforcement creditors

180 The *assurance fund* is liable for pecuniary loss suffered by an *enforcement creditor* as a result of the negligent performance or non-performance of a *sheriff's* duties under this Act.

Section 181

1. Reference: Recommendation 160.

2. Note that subsection (1) would change the common law, as embodied by s. 5(6) of the *Proceedings Against the Crown Act*. However, given that the assurance fund is simply a paper account within the General Revenue Fund, the Crown's liability to indemnify the assurance fund would not actually result in any money changing hands. The practical consequence of the Crown's being liable to indemnify the fund is that the assurance fund balance will be higher than it would otherwise have been. This, in turn, could affect the amount of the assurance fund levy subsequently charged to enforcement creditors.

Section 182

Reference: Recommendation 160.

Section 183

Reference: Recommendations 151, 161.

Section 184

Reference: Recommendation 6.

Section 185

1. Reference: ECA, s. 4(5),(6).

2. This section generalizes the requirements of the ECA, which apply only to seizures.

3. Under the ECA, s. 4(6), the sheriff is directed, in effect, to ignore the writs of any creditor who has instructed the sheriff "not to seize, or not to continue seizure, or to discontinue, release or abandon the seizure". This provision is not carried forward into the JEA. If the original instructing creditor instructs the sheriff to release seizure, and another enforcement creditor tells the sheriff to continue the seizure, the original instructing creditor loses the status of instructing creditor (which carries with it the entitlement to the "preferred share" given by s. 172(f)). However, his or her status as an enforcement creditor is otherwise not impaired.

mnification of rance fund

181

(1) The Crown shall indemnify the *assurance fund* if the fund incurs a liability as the result of the deliberate misconduct or negligence of a *sheriff*.

(2) The *instructing creditor* shall indemnify the *assurance fund* if the fund incurs a liability as the result of an action taken by a *sheriff* in accordance with the creditor's instructions, and the creditor knew or ought to have known that it was likely that by acting upon the instructions the *sheriff* would cause a loss for which the fund would be liable.

(3) An *enforcement creditor* shall indemnify the *assurance fund* if the fund incurs a liability as a result of the creditor's deliberate or negligent failure to register required information in the Enforcement Registry.

rt ordered rity

182 On application by a *sheriff*, the *Court* may require an *instructing creditor* to provide security for his potential *obligation* to indemnify the *assurance fund* under section 181(2).

rt's discretion

183

(1) Notwithstanding anything in this Part, in an action brought in respect of anything done under the authority of this Act, if the conduct of any *person* or any other special circumstance makes it just and equitable to do so, the *Court* may

(a) dismiss the action,

(b) reduce the damages that would otherwise be payable to the plaintiff.

(2) Nothing in this Part prevents the *Court* from awarding punitive damages against any *person* where it would be in accordance with the practice of the *Court* to do so.

PART 13

MISCELLANEOUS

imprisonment debt

184 Except as provided in any Act, no *person* may be arrested or imprisoned for default in payment of a *money judgment*.

continuance of ceedings

185

(1) Before discontinuing or withdrawing any *enforcement proceedings* at the direction of the *instructing creditor*, the *sheriff* shall serve written notice of the direction on every other *enforcement creditor*.

Section 186

1. Reference: Recommendation 5.

2. This section is intended to give the court considerable flexibility, both as to the matters with which it may deal and the manner in which it deals with them.

(2) If within 14 days of receiving notice under subsection (1), an *enforcement creditor* instructs the *sheriff* in writing to continue the *enforcement proceedings* and makes any payment required by the *sheriff*

(a) the proceedings shall continue, and

(b) the creditor upon whose instructions the proceedings are continued is thereafter deemed to be the *instructing creditor*.

Applications to Court

186

(1) The *Court* may determine any matter or issue that arises in *enforcement proceedings* under this Act on application by a *sheriff* or any interested *person*.

(2) Unless otherwise expressly provided, any application under this Act shall be made by motion on notice to such *persons* as the *Court* may approve or direct.

(3) On any application under this Act the *Court* may

(a) summarily determine any issue on the basis of oral or affidavit evidence, or both,

(b) adjourn the hearing of the application, either indefinitely or for any period it considers appropriate,

(c) give such directions as it considers proper regarding the parties to and carriage of the proceedings,

(d) direct the trial of an issue,

(e) give such directions as it considers proper regarding the interim preservation, custody or control of any *property* that is the subject of *enforcement proceedings*,

(f) make an order subject to any terms or conditions that it considers proper, and

(g) make any order regarding costs that it considers proper.

(4) The provisions of the *Court of Queen's Bench Act*, the *Judicature Act*, and the Alberta Rules of Court apply to any proceedings under this Act, except where inconsistent with this Act or any regulations made under this Act.

Section 187

The main purpose of this section is to dispense with frequent references to "the enforcement creditor or his solicitor" and similar references.

Section 188

1. Reference: PPSA, s. 70.

2. Clauses (1)(f) and (1)(g) are not contained in the PPSA. The purpose of (f) should be readily apparent. Clause (g) is primarily intended to allow the regulations to provide for service through electronic methods, such as facsimile transmission. Given the pace of technological developments in this area, it would be pointless to attempt to deal with such methods of service in the JEA itself.

Authorized representatives

187 Where this Act requires or permits anything to be done by, served on or paid to a certain *person*, it may be done by, served on or paid to

(a) the *person's* solicitor of record, or

(b) anyone who the *person* has authorized in writing to do or receive that thing on his behalf.

Service of documents

188

(1) Except as otherwise expresely required, a notice or document required or permitted to be served or delivered under this Act may be served or delivered as follows:

(a) for an individual by leaving it with the individual or by registered mail addressed by indicating the individual's name and residence, or the name and place of any business of the individual;

(b) for a partnership

(i) by leaving it with

(A) one or more of the general partners, or

(B) a *person* having control or management of the partnership business, or

(ii) by registered mail addressed to

(A) the partnership,

(B) any one or more of the general partners, or

(C) any *person* having control or management of the partnership business

at the address of the partnership business;

(c) for a corporation, other than a municipality,

(i) by leaving it with an officer or director of the corporation or *person* in charge of any office or place of business of the corporation,

(ii) by leaving it with or by registered mail addressed to the registered or head office of the corporation,

Section 188 (continued)

3. Subsection (3) recognizes the possibility that even registered mail may not always reach the addressee within 4 days, or at all. This subsection is intended to deal with situations where the "deemed service" rule in subsection (2)(b) would be prejudicial to the addressee.

(iii) where the corporation has its registered or head office outside the Province, by leaving it with, or by registered mail addressed to, its attorney for service appointed under Part 21 of the *Business Corporations Act*;

(d) for a municipal corporation by leaving it with, or by registered mail addressed to, the principal office of the corporation or to the chief administrative officer of the corporation;

(e) for an association

(i) by leaving it with an officer of the association, or

(ii) by registered mail addressed to an officer of the association at the address of the officer;

(f) for a *sheriff*, by leaving it with the *sheriff* or by registered mail addressed to the *sheriff's* office;

(g) by a method permitted by the regulations.

(2) A document sent by registered mail is deemed to be served or delivered

(a) when the addressee actually receives it, or

(b) on the expiry of 4 days after registration,

whichever is earlier.

(3) Where the *Court* is satisfied that

(a) the addressee did not receive a document sent by registered mail within 4 days of registration,

(b) the failure of the addressee to receive the document is not attributable to his own efforts to avoid receiving it, and

(c) the addressee would be prejudiced by the strict application of subsection (2)(b),

the *Court* may make any order it considers proper regarding any matter relating to the document.

Section 189

1. Reference: Recommendation 128.

2. Recommendation 128 only mentions monetary limits having to do with exemptions, but the principle behind it is equally applicable to any other monetary limits.

3. The purpose of subsection (2) is to make it clear whether the old limit or the revised limit applies where an enforcement proceeding to which the limit applies is under way when a revision takes place.

(4) Unless a provision of this Act requiring service or delivery of a document expressly refers to the original or a certified copy of the document, it is sufficient to serve or deliver a copy of the document.

Adjustment of dollar amounts

189

(1) The Lieutenant Governor in Council may, by regulation, revise upwards the amount of any monetary limit set out in section 43, 84, 157, 158 or 159 or in Schedule A (section 139).

(2) Where a monetary limit is revised in accordance with subsection (1), the following rules shall apply in any proceedings for which the limit is relevant:

(a) for the purposes of section 43, the limit is the one in force on the date of a relevant sale or lease;

(b) for the purposes of section 84, the limit is the one in force on the date the *property* is sold by the *sheriff;*

(c) for the purposes of section 139 and Schedule A, until the garnishee is served with notice of the revised limit, the limit is the one in force on the date the relevant garnishee summons was issued;

(d) for the purposes of sections 157, 158, and 159, the limit is the one in force on the date of a relevant seizure or, in the case of *land*, on the date the *sheriff* completes a sale of the *land*.

(3) Where the minimum or maximum employment earnings exemption set out in Schedule A is revised while a continuing garnishee summons against employment earnings is in effect, the *sheriff* shall serve on the garnishee a notice in prescribed form setting out the revised minimum or maximum exemption.

Regulations

190

(1) The Lieutenant Governor in Council may make regulations

(a) providing for the appointment of officials to administer the Enforcement Registry and for their titles and duties;

(b) respecting fees, including

(i) the amount of fees,

(ii) the circumstances in which fees may be charged to an account, and

(iii) the portion of the fee for registering a *writ* that is to be credited to the *assurance fund;*

(c) respecting the form and contents of notices or other documents provided for by this Act;

(d) respecting *sheriffs'* records, including

(i) matters additional to those specifically referred to in section 13 of which *sheriffs* shall maintain a record,

(ii) the length of time for which *sheriffs* shall retain a record of any particular matter;

(e) fixing the amount of garnishees' compensation;

(f) providing for the service of documents or notices by methods not provided for by this Act;

(g) respecting the transitional application of the provisions of this Act;

(h) respecting any matter required or authorized by this Act to be prescribed.

(2) Where this Act states that a document is to be in prescribed form, and also states that the document is to contain certain information or statements, the regulations may require the document to contain information or statements additional to those required by this Act.

CONSEQUENTIAL

References

191

(1) A reference in an Act or regulation to the *Execution Creditors Act*, the *Exemptions Act*, the *Seizures Act* or the Rules of Court that relates to the enforcement of a *money judgment* is deemed to be a reference to this Act or the corresponding provisions of this Act.

(2) A reference in an Act or regulation to a writ of fieri facias, writ of attachment, writ of execution, execution creditor, execution debtor or any cognate term is deemed to be a reference to a writ of enforcement, attachment order, *enforcement creditor* or *enforcement debtor*, as the context requires.

Schedule A

Reference: Recommendation 111.

SCHEDULE A

JUDGMENT ENFORCEMENT ACT

The minimum and maximum *employment earnings* exemptions referred to in section 135(3) are as follows:

NUMBER OF Dependants	MINIMUM EXEMPTION	MAXIMUM
0	$ 800.00	$ 2400.00
1	1330.00	2930.00
2	1596.00	3196.00
3	1862.00	3462.00
4	2128.00	3728.00
5	2394.00	3994.00

If the enforcement debtor has more than 5 dependants,

(a) the debtor's minimum exemption is equal to $ 2394.00 plus the product of $ 266.00 multiplied by the number of dependants in excess of 5, and

(b) the debtor's maximum exemption is equal to his minimum exemption plus $ 1600.00

For the purposes of this Schedule and section 139 of the Act, unless otherwise ordered by the *Court*, a garnishee shall treat the following persons as an *enforcement debtor's* dependants:

(a) persons treated as dependants of the *enforcement debtor* for the purpose of determining payroll deductions under the *Income Tax Act* (Canada);

(b) the *enforcement debtor's* spouse, if the debtor's payroll deductions under the *Income Tax Act* (Canada) reflect a claim for a "married amount" tax credit or deduction.

APPENDIX A

LISTS OF RECOMMENDATIONS

LIST OF RECOMMENDATIONS FROM VOLUME 1

RECOMMENDATION 1 UNIVERSAL EXIGIBILITY

All the property of a judgment debtor should be subject to enforcement regardless of its form or character, excepting only property that has been excluded deliberately from enforcement. No property should be "exempt" from enforcement for lack of an enforcement procedure.

RECOMMENDATION 2 JUST EXEMPTIONS

The deliberately exempted property should be sufficient to permit debtors to maintain themselves and their dependents at a reasonable standard and to have reasonable security that they will be able to continue to do so in the future.

RECOMMENDATION 3 CREDITOR INITIATIVE

The enforcement process should rely on the initiative of the creditor for its operation. The suggestion, made in other jurisdictions, of an enforcement system operated entirely by a court or government official without specific instructions from creditors should not be adopted in Alberta.

RECOMMENDATION 4 ONE STATUTE

The enforcement of money judgments should be governed by one statute that describes the system of enforcement and the various processes, and the procedures that are a part of it, in consistent, coherent and logically ordered terms.

RECOMMENDATION 5 JUDICIAL SUPERVISION

The various enforcement processes should be designed to minimize the occasions when an application to the court is required; however, the processes should also be designed to permit easy access to the court whenever judicial supervision of a specific aspect of enforcement is required. All parties should have the right to seek the direction of the court on any point that arises in the course of enforcement.

RECOMMENDATION 6 IMPRISONMENT FOR DEBT

The existing policy of prohibiting imprisonment as a remedy to enforce money judgments should be continued.

RECOMMENDATION 7 ONE COMMENCEMENT DOCUMENT

A creditor who wishes to undertake any enforcement process should be required first to deliver to the sheriff a document issued by the clerk of the court certifying that a judgment has been entered against the judgment debtor and setting out such particulars of that judgment as are required for the conduct of enforcement procedures.

RECOMMENDATION 8 THE WRIT OF ENFORCEMENT

The enforcement commencement document should be called the "writ of enforcement".

RECOMMENDATION 9 THE ENFORCEMENT REGISTER

There should be a computer register of all enforcement activity undertaken against each enforcement debtor. The register should be maintained centrally and should be accessible province wide from the offices of all sheriffs. The register should be available for public searches. It should be called the Enforcement Register.

Upon receipt of a writ of enforcement, the sheriff should enter the particulars in the Enforcement Register.

RECOMMENDATION 10 EFFECT OF DELIVERY OF THE WRIT TO THE SHERIFF

When the writ of enforcement has been delivered to the sheriff, the creditor should be able to undertake or instruct any enforcement process. The delivery of the writ of enforcement to the sheriff should authorize the sheriff to accept and carry out the lawful enforcement instructions of the creditor; however, that the writ has been delivered to the sheriff should have no effect on a third party who might deal with the debtor, even where the third party has knowledge of the writ.

RECOMMENDATION 11 ALL PERSONAL PROPERTY BOUND

Upon registration of the writ of enforcement in the PPR, all the personal property of the debtor should be bound. The binding effect should not be confined to the property exigible at common law.

RECOMMENDATION 12 BINDING EFFECT — INTERESTS IN LAND

The debtor's interests in land should be bound only upon registration of the writ in accordance with the provisions of the *Land Titles Act*.

RECOMMENDATION 13 BINDING EFFECT — GARNISHABLE DEBTS

Garnishable debts owed to the debtor should be bound from the time of registration of the writ in the PPR.

The binding effect of the writ in this context should be distinguished from the "binding effect" of service of the garnishee summons. The binding effect of the writ will not affect the conduct of the potential garnishee, who should be able to pay the debt to the debtor notwithstanding the writ. Only the debtor and transferees of the debt from the debtor will be affected.

The word "attach" should be used to describe the effect of serving the garnishee summons on the garnishee.

RECOMMENDATION 14 PROVINCE-WIDE EFFECT

The binding effect of the writ in respect of personal property should be province wide. The present limitation of the effect to property within the judicial district of the sheriff to whom the writ is delivered should be abandoned.

RECOMMENDATION 15 ORDINARY COURSE OF BUSINESS EXCEPTION

A writ registered in the PPR should not affect the interest of a third party in goods acquired from the debtor in good faith, for valuable consideration, without actual knowledge of the writ, and in the ordinary course of the debtor's business.

The course of business exception should also apply to sales by the debtor of seized goods that have been left with the debtor on a bailee's undertaking.

RECOMMENDATION 16 "GARAGE SALE" EXCEPTION

A writ registered in the PPR should not affect the interest of a third party in consumer goods acquired from the debtor in good faith, for valuable consideration, and without actual knowledge of the writ where the consideration paid or the value of the goods does not exceed $1000.

This "garage sale" exception should also apply to sales by the debtor of seized consumer goods that have been left with the debtor on a bailee's undertaking.

RECOMMENDATION 17 NEGOTIABLE INSTRUMENTS EXCEPTION

A writ registered in the PPR should not affect the interest of a holder of a negotiable instrument acquired from the debtor in good faith, for valuable consideration, and without actual knowledge of the writ.

This exception should also apply to transfers by the debtor of seized negotiable instruments that have been left with the debtor on a bailee's undertaking.

RECOMMENDATION 18 MONEY EXCEPTION

A writ registered in the PPR should not affect a person who acquires money from the debtor in good faith or for valuable consideration, whether or not the person had actual knowledge of the writ.

RECOMMENDATION 19 SERIAL-NUMBERED GOODS EXCEPTION

A writ registered in the PPR should not affect the interest of a purchaser of "serial-numbered goods" acquired from the debtor in good faith, for valuable consideration, and without actual knowledge of the writ unless the writ is registered against the serial number specifically.

RECOMMENDATION 20 PRIORITIES BETWEEN SECURITY INTERESTS AND REGISTERED WRITS

A security interest, whether perfected or not, that exists at the time the writ is issued should have priority over the writ, whether the writ is registered or not, except that where there has been seizure under a writ the interest arising by reason of the seizure should have priority over an unperfected security.

RECOMMENDATION 21 TIME OF ISSUING WRIT AND DURATION OF WRIT

The judgment creditor should be allowed to issue a writ of enforcement anytime after entry of the formal judgment and during the time that the judgment is in force.

The existing rule, which says that after six years a writ can be issued only with leave, should be abandoned.

The writ of enforcement should continue in force for so long as the judgment on which it is issued remains in force and the debt remains unsatisfied.

RECOMMENDATION 22 VOLUNTARY FINANCIAL STATEMENT

The enforcement debtor should be given the opportunity to file with the sheriff a sworn statement of his or her assets and liabilities and the dispositions of property he or she has made since the debt was incurred. A simple form, on which such a statement can be made, should be available to debtors from the sheriff. The debtor should be subject to cross-examination on the statement by the creditor. The statement should be available to all enforcement creditors of the debtor.

RECOMMENDATION 23 INFORMATION FOR THE ASSISTANCE OF OTHER CREDITORS

There should be no requirement that a transcript of every examination in aid be prepared, but creditors should be obliged to inform the sheriff's office of examinations held so that this information can be entered in the Enforcement Registry. Other enforcement creditors may order a transcript from the officer who conducted the examination if they wish.

RECOMMENDATION 24 THIRD-PARTY INFORMATION

Where a reasonable possibility that a third party has information regarding the debtor or his or her assets is established, and there is no reason why the third party should not be called upon to reveal the information to the creditor, the court should be able to order the third party to reveal the information to the creditor.

A court order should not be required, however, to compel municipalities to release information as to whether or not an enforcement debtor is shown as the owner of land on municipal tax rolls. A municipality should be required to reveal this information to an enforcement creditor upon payment of a reasonable fee. The municipality might validly require production of a certified copy of the writ of enforcement to be satisfied that the creditor has a legitimate interest in obtaining the information.

RECOMMENDATION 25 SHERIFF'S EXCLUSIVE AUTHORITY TO SEIZE

The present requirement that seizure must be carried out by the sheriff, or a person authorized by the sheriff, should not be changed.

RECOMMENDATION 26 TERRITORIAL AUTHORITY OF THE SHERIFF

Each sheriff should have the authority to effect seizure anywhere in Alberta. A creditor should be at liberty to instruct any sheriff to effect seizure. If the sheriff receiving the instructions considers it more convenient that another sheriff carry out the instructions, or any part of them, then that sheriff should be able to assign the instructions, or any part of them, to another sheriff and give notice of the assignment to the instructing creditor.

RECOMMENDATION 27 SEIZURE INSTRUCTIONS

Written instructions for seizure should continue to be required before the sheriff is obliged to initiate seizure. A standard letter of instruction acceptable to all sheriffs, should be developed.

RECOMMENDATION 28 SEIZURE INSTRUCTIONS — SUBSISTING WRIT

The sheriff should not accept any seizure instructions from a creditor unless the creditor's writ is subsisting at the time the instructions are given.

RECOMMENDATION 29 SECURITY

A creditor who delivers seizure instructions to the sheriff should be required to give security for the fees, charges and expenses of the sheriff in carrying out the instructions. The present requirement of security sufficient to indemnify the sheriff in respect of claims for damages incurred in making seizure should be replaced by an "assurance fund levy", paid at the time of filing the writ of enforcement with the sheriff as described in the recommendations below dealing with the establishment of an assurance fund.

RECOMMENDATION 30 INFORMATION AS TO DEBTOR'S ASSETS

The creditor should be required to provide the sheriff with such information as the sheriff reasonably requires to attempt seizure. The sheriff should be under no duty to attempt seizure until in receipt of such information.

RECOMMENDATION 31 DOCUMENTATION

The seizure instructions should include such documentation as the sheriff will require to complete the instructed seizure.

RECOMMENDATION 32 EFFECTING SEIZURE

The method of effecting seizure should be set out in the statute, and for a "standard" seizure (seizure of non-serial number goods), should consist of the following requirements:

(a) the property to be seized must be identified in the notice of seizure;

(b) the sheriff must go to the premises or other place where the property to be seized is located and do one of the following:

  (i) serve the seizure documents on the enforcement debtor, an occupant of the premises, or a person who appears to be in possession of the property; or

  (ii) if there is no one present upon whom the seizure documents can be served, post the seizure documents on the premises, or attach them to property that is seized.

The sheriff should continue to have the option of attaching a sticker to seized property in order to help identify it and distinguish it from property that is not seized.

If the seizure documents are not served on the enforcement debtor or an adult member of the debtor's household while seizure is being effected, they should be served on the enforcement debtor later.

Service of the seizure documents should be effected by one of the methods of service set out in section 70 of the PPSA.

RECOMMENDATION 33 ENTRY ONTO PREMISES

Entry:

The sheriff should have statutory authority to enter onto the debtor's premises, or the non-residential premises of a third party, to effect seizure.

Unless he has the consent of a third party to enter a third party's residential premises to effect seizure of the debtor's property, the sheriff should have the authority of a court order to do so. Such an order should be granted where there is a reasonable likelihood that exigible property of the debtor is located on the premises of the third party.

Use of Force:

The sheriff should be able to use force to gain entry to the debtor's non-residential premises without a court order.

Forcible entry to any other premises (the debtor's residence or any premises of a third party) should require a court order.

After gaining entry, the sheriff should be able to break an interior door or other closure to gain access to the debtor's property.

Where the sheriff uses force to gain entry to any premises for the purpose of seizure, he should take reasonable care to ensure that the property is secure when he leaves.

Damages to Third Party:

A third party who suffers damages as a result of a forced entry should be compensated unless the third party could reasonably have prevented the damage.

RECOMMENDATION 34 TIME OF SEIZURE

Unless the court orders otherwise, no seizure under a writ of enforcement should be permitted on residential premises between the hours of 9 pm and 6 am.

RECOMMENDATION 35 BAILEE'S UNDERTAKINGS

The existing bailee's undertaking procedure should be continued in the reformed legislation. The form of undertaking should inform the bailee of the consequences of a breach of the undertaking.

RECOMMENDATION 36 REGISTRATION OF NOTICE OF SEIZURE

After effecting seizure, the sheriff should enter the notice of seizure into the Enforcement Registry.

RECOMMENDATION 37 SEIZURE OF SERIAL-NUMBERED PROPERTY

As an alternative to the regular seizure procedure, seizure of serial-numbered property should be effected by registration of a notice of seizure that describes the property by its serial number in the PPR. Such registration should be followed by service of the notice of seizure on the debtor.

Where serial-numbered property is seized by the ordinary seizure process, the exception to the effect of registration of the writ of enforcement in the PPR should continue until the writ is registered against the serial number of the seized property.

RECOMMENDATION 38 PROPERTY IN THE HANDS OF A THIRD PARTY

As an alternative to seizure by the ordinary process, where property of the debtor is in the hands of a third party, the sheriff, on the creditor's instruction, should issue a notice for service on the third party, requiring the third party to deliver the property to the sheriff or to make it available for seizure.

The process should operate in a parallel manner to the process of garnishment of debts owed to the debtor. For example, the third party should be required to respond to the notice if unable to comply with it, and should be liable in the same manner as a garnishee if he or she fails to respond or comply. Compliance with the requirements of the notice should relieve the third party of his or her obligation to the debtor. The third party should be compensated for the cost in complying with the sheriff's requirements.

RECOMMENDATION 39 OBJECTION PROCEDURE

At the same time as the debtor is served with the notice of objection to seizure, he or she should also be served with a document called "Instructions to Debtor", which should include:

a. a simple explanation of the seizure process;

b. a description of the exemptions to which debtors are entitled;

c. an explanation of the court's power to delay removal and sale if the debtor can establish that he or she can pay the debt over time;

d. a description of the process whereby objections are brought before the court to be dealt with;

e. advice as to where the debtor might seek advice and assistance; and

f. a statement that the debtor might become liable for added costs if he or she uses the objection procedure frivolously.

The debtor should be required to state the nature of his or her objection to the seizure in the notice of objection. The sheriff should not reject any notice of objection that states an obviously inadequate reason or is silent as to the reason. The debtor should not be restricted to the reason given on the notice of objection at the removal and sale application.

The sheriff should be required to reject any notice of objection delivered to him more than 14 days after the date of service of the notice of seizure on the debtor, except where otherwise ordered by the court.

The existing procedure of a court application initiated by the creditor who wishes to challenge the debtor's objection should be retained.

The creditor should be obliged to bring the application for removal and sale in the judicial district in which the seizure occurred unless the debtor otherwise consents or the court otherwise orders.

The debtor should be able to consent to the removal and sale of seized property anytime after seizure.

RECOMMENDATION 40 REMOVAL

The sheriff should be required to remove seized property from the debtor, at the time of seizure or anytime thereafter, upon receiving from the creditor instructions to that effect and such security as the sheriff requires to ensure that the cost of removal and storage of the property pending sale is covered.

Where the sheriff takes possession of seized property from the debtor, he should provide the debtor (or whoever was in possession of the property) with a written inventory of the property removed.

RECOMMENDATION 41 SALE INSTRUCTIONS

The sheriff should not proceed to sell the seized property until he has received written instructions from the creditor to do so.

RECOMMENDATION 42 METHOD OF SALE

The creditor should suggest a method of sale at the time that he or she instructs sale. The sheriff, after considering the creditor's suggestion, should use whatever method of sale he thinks will produce the best price.

The sheriff should be able to retain such expert assistance as he reasonably requires to effect a sale, subject to the creditor's willingness to indemnify him for the costs involved.

The sheriff should give the debtor and the creditor notice before the proposed sale, indicating the method of sale that he intends to use. Either the creditor or the debtor should have the right to apply to the court within 14 days of the notice for directions if either objects to the method of sale proposed by the sheriff.

If the sheriff cannot obtain a reasonable price for the property, the creditor should be able to apply to the court for authorization to sell at whatever price the property will bring, except where the reasonable value of the property is less than $1000, in which case the sheriff should be at liberty to sell at the best obtainable price without application.

RECOMMENDATION 43 SALES TO THE CREDITOR

The creditor should be able to buy the seized goods from the sheriff, but where the sale is private the sale should not be concluded unless the price bears a reasonable relationship to the market value of the property and until the debtor has been given notice of the proposed terms of the sale and has had an opportunity to object by application to the court. The objection period should be 14 days.

RECOMMENDATION 44 THE BUYER'S TITLE

The sheriff should be required to inform prospective purchasers of registered encumbrances affecting the debtor's title to the seized property at the time of sale. If he fails to do so and a purchaser is prejudiced as a result, the purchaser should be compensated from the enforcement assurance fund. A purchaser who suffers a loss as a result of the debtor not having had title to the property should also have a right to compensation from the assurance fund.

RECOMMENDATION 45 NEGOTIABLE INSTRUMENTS — SEIZURE

Enforcement against a negotiable instrument held by the debtor should be accomplished by the same seizure process that applies to tangible chattels.

As in the general seizure process, removal of the instrument from the possession of the debtor should not be an essential element of a legally effective seizure, even though it might be required to render the seizure practically effective.

RECOMMENDATION 46 REALIZATION ON NEGOTIABLE INSTRUMENTS

The statute should provide that the sheriff is the agent of the debtor with authority to deal with seized negotiable instruments as fully as would be the case if the debtor had granted such authority.

The present provision that contemplates the sheriff paying or assigning a seized instrument to the creditor should be abolished in favour of the "sale to creditor", which is part of the recommended general seizure procedure.

RECOMMENDATION 47 DEFINITIONS RELATING TO SEIZURE OF SECURITIES

The proposed enforcement system should make special provision for seizure of securities, defined as including:

(a) non-publicly traded shares in corporations;

(b) publicly traded interests in and obligations of corporations and other entities, such as governments, limited partnerships and trusts; and

(c) publicly traded rights to acquire or sell interests or obligations referred to in (b).

For certain purposes, a distinction should be drawn between publicly traded securities and non-publicly traded securities. The latter category would consist only of non-publicly traded shares.

A security would be considered to be publicly traded if it met either of the following two criteria:

(a) the security is listed on a securities exchange; or

(b) prices or values for the security routinely appear in published securities market reports or in quotation services used by securities dealers.

RECOMMENDATION 48 SEIZURE OF SECURITIES

Seizure of securities owned by an enforcement debtor should be accomplished by one of the following methods:

(a) seizure of the security certificates that represent the securities;

(b) service of an appropriately worded notice of seizure on the issuer of the securities where the enforcement debtor is the registered holder of the securities; and

(c) service of an appropriately worded notice of seizure on a broker or other third party who holds the securities for the enforcement debtor.

The method of seizure actually used should be at the discretion of the sheriff, except that seizure by method (b) or method (c) should be permissible only where the notice of seizure can be served on the relevant person (issuer or third party) in Alberta.

The mechanics of seizure should not depend on the place of incorporation or the residence of the issuer; however, where a security issued by a "foreign" issuer is seized, the court should be able to make any order it considers necessary to prevent the issuer, or any other person, from being prejudiced as a result of a conflict between the Alberta laws and the laws of the issuer's home jurisdiction.

Where a notice of seizure is served on the issuer of certain non-publicly traded shares, the issuer should be obliged to indicate this to any third party who makes enquiries regarding the enforcement debtor's ownership of an ability to transfer the shares.

Where seizure is effected by serving a notice of seizure on a third party, the third party should be obliged to hold and deal with the security in accordance with the directions of the sheriff, and should be liable to enforcement creditors for failing to do so.

RECOMMENDATION 49 EFFECT OF SEIZURE ON SUBSEQUENT TRANSFEREES

Regardless of whether a security that is bound by a writ has been seized or not, a purchaser for value who takes possession of the security certificate evidencing the security without knowledge of the seizure or knowledge of the writ, should have priority over the writ.

A person who purchases a publicly traded security in a transaction that is settled through a clearing agency should have priority over a writ that binds the security, as long as at the time of settlement of the transaction the purchaser did not have knowledge that the security was bound by the writ or was under seizure.

RECOMMENDATION 50 DIVIDENDS AND OTHER PAYMENTS

Where the enforcement debtor is the registered holder of a security that has been seized by a method other than serving the notice of seizure on the issuer, the sheriff should be required to serve a copy of the notice of seizure on the issuer as soon after effecting seizure as is practicable.

Where a notice of seizure has been served on the issuer of a security of which the enforcement debtor is the registered holder, the issuer should be required to pay to the sheriff any dividend or other payment that it would otherwise be required to pay to the enforcement debtor.

An issuer should not be liable if its transfer agent pays a dividend to the enforcement debtor after service of a notice of seizure on the issuer unless the transfer agent has been notified of the seizure or 48 hours have elapsed since the notice of seizure was served on the issuer. A transfer agent who does pay a dividend to an enforcement debtor after being notified of a seizure should be liable to indemnify the issuer.

Where the enforcement debtor is not the registered holder of the seized security, and seizure has been effected by serving the notice of seizure on a third party, the third party should be required to divert to the sheriff any dividend or other payment in respect of the security that it would otherwise be required to pay to the debtor.

The sheriff should be entitled to make any election that the enforcement debtor would otherwise be entitled to make with respect to a dividend or other payment.

RECOMMENDATION 51 REALIZATION OF PUBLICLY TRADED SECURITIES

A sheriff who has seized a publicly traded security should be authorized to sell or otherwise realize the security through the normal market mechanism.

Where it would ordinarily be necessary for the enforcement debtor to endorse a security certificate or other document to dispose of the security, the sheriff should be authorized to do so in place of the debtor.

Where the transfer or other disposition of a security would ordinarily require delivery of the security certificate, this requirement should apply to a disposition by the sheriff. If the court is satisfied, however, that:

(a) the security certificate in question appears to have been lost, destroyed or wrongfully taken from the enforcement debtor;

(b) there is no evidence that the missing certificate has got into the hands of a purchaser for value whose interest in the security would have priority over the relevant writ or writs; and

(c) an adequate indemnity bond has been provided to the issuer by the instructing creditor;

then the court should be able to require the issuer to recognize a disposition by the sheriff of the security represented by the missing certificate.

RECOMMENDATION 52 REALIZATION ON SHARES WITH A TRANSFER RESTRICTION

Where the sheriff seizes shares of a debtor in a corporation, and the corporation's incorporating documents, unanimous shareholders' agreement, or other documents restrict or prohibit the right to transfer those shares, such restriction or prohibition should not apply to the sale by the sheriff.

Provisions in such corporate documents that provide for the sale of shares to other shareholders at less than fair value, when enforcement is entered against one shareholder, should be ineffective to frustrate enforcement.

The other shareholders, severally and collectively, and the corporation should have the right to:

a) discharge the debt and have the seizure released;

b) purchase the shares before anyone else;

c) have the corporation wound up before the shares are offered for sale;

d) make any other proposal to the sheriff and creditors as an alternative to the sale of the shares; and

e) seek approval of such a proposal by the court where the sheriff and the creditors do not accept it. The court should approve such a proposal where it will not cause substantial prejudice to the creditors.

The sheriff should give the corporation and the creditors notice of the process by which he proposes to dispose of the shares. That process should include any procedures required by the corporation's incorporating documents that will not prevent the sale. The sheriff should be at liberty to seek directions from the court in establishing the sale process. The corporation should be at liberty to seek the intervention of the court to require the sheriff to include in the proposed method of sale any requirement of the incorporating documents that he has omitted, except those that would prevent the sale. The court should order the sheriff to include the procedure that will not prevent the sale, and the omission of which would be prejudicial to the interests of the corporation.

The enforcement process should be designed so as to give the corporation and the other shareholders generous opportunity to preserve the membership of the corporation, but if they do not or cannot avail themselves of that opportunity, enforcement should not be frustrated. Any restriction on the transferability of shares that would prevent the purchaser from registering the purchase and exercising shareholder rights should not apply in a sale under a writ of enforcement.

RECOMMENDATION 53 FINANCIAL INFORMATION ON THE CORPORATION

Upon service of a notice of seizure in respect of shares of a corporation, and upon seizure of negotiable shares, the sheriff should become entitled to receipt of the financial information to which a shareholder in the corporation is entitled.

The sheriff should use that information to determine the value of the shares against which enforcement is proceeding and in assessing offers made for the shares in the course of the sale process. In conducting the sale, the sheriff should be able to use the information in any way that the debtor could use it.

Where the sheriff is not able to effect a sale at a price he considers reasonable, he should be at liberty to apply to the court for authorization to sell the shares at the best obtainable price.

RECOMMENDATION 54 ENFORCEMENT AGAINST DEBTOR'S INTERESTS AS A SECURED CREDITOR

Enforcement against a debtor's security interest in real property should be accomplished by the sheriff registering a notice of sale, on instruction from the creditor, on the title to the land in which the security interest is held according to the procedure recommended hereafter for enforcement against land.

Enforcement against a debtor's security interest in chattels should be accomplished by the sheriff registering a financing statement in respect of the enforcement against the debtor in the PPR.

The sheriff should also serve a notice of enforcement and a notice of objection on the debtor according to the procedure recommended for the seizure of serial-numbered goods.

RECOMMENDATION 55 REALIZATION ON SEIZED DEBT SECURITY AGREEMENTS

Payments to be made to the debtor under seized debt security agreement should be diverted to the sheriff upon the sheriff serving the party obliged to make those payments with an appropriate notice.

The sheriff should be able to collect the payments due and to enforce the security in the same manner as the debtor if the party obligated under the security agreement is in default.

The sheriff should also be able to sell the security agreement as he would sell any seized property. The present requirement of a court order to authorize such a sale should be abandoned.

RECOMMENDATION 56 EXIGIBILITY OF INTERESTS IN LAND

All interests in land, regardless of whether they are legal, equitable, registered, unregistered, classified as interests in land or classified as personalty, should be exigible, except those that are deliberately exempted. Exigibility should not depend on whether the interest can be classified as an "interest in land".

RECOMMENDATION 57 INITIATION OF SALE OF REGISTERED LAND

Enforcement against interests in registered land should be initiated by the creditor instructing the sheriff to sell the land. The sheriff would then issue a notice of sale, which would be recorded on title and served on the debtor and all parties having an interest recorded on title. The sheriff would enter the notice of sale in the Enforcement Registry.

RECOMMENDATION 58 PROCEDURAL RESTRICTIONS ON ENFORCEMENT AGAINST LAND

The present requirement of a return *nulla bona* before sale of land in enforcement proceedings should be abandoned.

A requirement that the sheriff not sell the land before the expiry of a six-month period from the date of service of the notice of sale on all the parties upon whom service is required should be substituted for the present one-year delay.

The court should have a discretion to order the enlargement or reduction of this six-month delay where it considers it just to do so, and should also have a discretion to impose such terms as it considers just.

The present provision disentitling the creditor to costs of advertising land for sale, where the debt is satisfied by enforcement against goods and chattels, should be abandoned.

RECOMMENDATION 59 METHOD OF SALE

A creditor who instructs the sheriff to issue a notice of sale in respect of land should suggest a method of sale to the sheriff. The sheriff should be at able to accept the creditor's suggestion or choose some other method of sale.

The notice of sale should describe the method of sale that the sheriff intends to use. Any party upon whom the notice of sale is served should be able to apply for an order requiring a particular method to be used if dis-satisfied with the sheriff's choice.

If no such application is made during the 6-month delay period, the sheriff should be at liberty to use the method indicated in the notice of sale.

The court should have the power to make such orders as are required to facilitate the sale process.

RECOMMENDATION 60 COMPLETION OF SALE

The present requirement of an order confirming sale should be replaced by a requirement that the sheriff, upon finding a purchaser, serve notice of that fact on the debtor, on the holders of other encumbrances on the title of the land to be sold, and on the instructing creditor. The notice should recite the terms of the sale.

Any interested party should have the right to apply within 14 days of receipt of service for judicial intervention in the procedure to prevent conclusion of the sale.

The court should order that the sale not be concluded if there has been any deficiency in the procedure that has prejudiced the debtor or any other interested party, if it considers that reasonable efforts to find a buyer have not been made, if it considers any other term of the proposed sale is unacceptable, or if it considers that any other circumstance justifies such an order.

On such an application, the court should give directions to the sheriff for the continuation of the sale process.

If no such application is commenced within 14 days, the sale should be deemed confirmed, the sheriff should be able to deliver a transfer or other closing documentation, and all interested parties should be estopped from making any application to challenge the sale.

RECOMMENDATION 61 DOWER CONSENT TO SHERIFF'S DISPOSITION

The consent of the debtor's spouse should not be required for an enforcement sale of a homestead.

The contingent life interest created by the *Dower Act* should not survive an enforcement sale.

RECOMMENDATION 62 ENFORCEMENT AGAINST JOINT INTERESTS IN LAND

Legislation should make it clear that the interest of a debtor in land held as a joint tenant with another or others is exigible.

There should not be any change to the law regarding the effect of survivorship in joint tenancy on the binding effect of the writ. The binding effect should continue to be subject to the joint tenant's right of survivorship. If the debtor joint tenant dies, so that the debtor joint tenant's interest ceases to exist, the binding effect of the writ of enforcement on that land should be at an end.

RECOMMENDATION 63 ENFORCEMENT AGAINST UNREGISTERED INTERESTS IN LAND

The process proposed for enforcement against registered interests in land should apply as well to cases where the debtor holds an unregistered interest in registered land. Where the debtor owns an interest in unregistered land, the enforcement process should be left for determination of the court on application of the creditor wishing to enforce against it.

RECOMMENDATION 64 TRANSFER OF DUTIES FROM CLERK TO SHERIFF

The present functions of the clerk of the court relating to garnishment should be transferred to the sheriff.

RECOMMENDATION 65 TRANSFER OF PROVISIONS FROM THE RULES

The provisions establishing the garnishment process, both substantive and procedural, should be located in one statute — the same statute in which the provisions relating to the other enforcement processes are located.

RECOMMENDATION 66 GARNISHMENT AS OF RIGHT — ON AFFIDAVIT

Garnishment should continue to be available as of right. The remedy should not be dependant on the discretion of the court, the sheriff or any other official.

The procedure, however, should continue to require the enforcement creditor to file an affidavit in which the facts required to exist before the process can be invoked are established on oath.

RECOMMENDATION 67 OBJECTION PROCEDURE

The enforcement debtor should be served with a copy of the garnishee summons and the garnishee's response.

The enforcement debtor should be given the right to apply to the court for the determination of any objection he or she might have to the garnishment.

The garnishee should be required to state the last known address of the enforcement debtor; or, if that is contrary to a legal or contractual obligation binding the garnishee, the garnishee should be required to give the enforcement debtor notice of the garnishment and of his or her response.

RECOMMENDATION 68 COMPENSATION FOR THE GARNISHEE

The garnishee should be entitled to compensation from each payment made in, or from the fund remaining in his or her hands if the entire indebtedness to the debtor is not required to be paid into court. The amount of the compensation should be established by regulation and should be maintained at a fair level. It should not be less than $25 per payment in.

RECOMMENDATION 69 GARNISHMENT OF JOINT DEBTS

The scope of garnishment should extend to an enforcement debtor's interest in obligations due to the enforcement debtor and another, or others, jointly.

RECOMMENDATION 70 PROTECTION OF THE JOINT OBLIGEES

Where a joint debt is the subject of garnishment, the garnishee should assume that the interests of the various joint obligees are equal, except where the garnishee is by order instructed otherwise.

Where the creditor establishes, on application, that the enforcement debtor is entitled to a greater portion of the joint debt, the garnishee should be ordered to pay the greater sum in response to the garnishee summons.

After payment by the garnishee, but before distribution of the money, either the enforcement debtor or the joint obligee should have the opportunity to establish that the allocation of the joint debt between the joint obligees was inaccurate, and the court should make whatever order is required to correct the allocation.

The garnishee should be required to give notice of his or her payment to the joint obligee. The notice should include clear directions as to how the joint obligee can bring forward an objection.

There should be a prohibition of further garnishments of the same debt, except with leave of the court, until 30 days after the date of the notice to the joint obligee.

RECOMMENDATION 71 ATTACHMENT OF FUTURE ENTITLEMENTS

Subject to the limitations described in the following recommendations, the scope of garnishment should be expanded to permit an enforcement creditor to attach future entitlements of the enforcement debtor.

RECOMMENDATION 72 LIMITATION — OBLIGATION ARISING FROM EXISTING LEGAL RELATIONSHIP

Attachment of future obligations should be limited to such entitlements as might reasonably be expected to arise out of a legal relationship existing between the enforcement debtor and the proposed garnishee at the time of the attachment.

RECOMMENDATION 73 DURATION OF GARNISHMENT

A garnishment of a future obligation should expire one year after the date it is served on the garnishee unless a renewal summons is issued and served before the end of the year.

RECOMMENDATION 74 ADJUSTMENT OF AMOUNT BOUND BY THE GARNISHMENT

The amount attached by the garnishee summons should increase or decrease with the total amount owing on writs of enforcement against the debtor filed with the sheriff.

An enforcement creditor who files a new writ of enforcement should not be able to issue a new garnishee summons to a garnishee already subject to a garnishee summons.

The procedure should ensure that any changes in the total amount owing under writs of enforcement filed with the sheriff are communicated to the garnishee and that the amount bound by the garnishee summons is adjusted accordingly.

RECOMMENDATION 75 DEPOSIT ACCOUNTS

Deposit accounts should not be susceptible to garnishment except in respect of the balance held in the account at the time of service of the garnishment.

RECOMMENDATION 76 PERSONAL COMPENSATION ENTITLEMENTS

An enforcement debtor's possible future entitlement arising out of a cause of action for damages for personal injury or other damages, including the proceeds of a settlement of the cause of action, should be subject to attachment.

RECOMMENDATION 77 DISCRETIONARY EXEMPTION

Where an enforcement creditor issues a garnishee summons against a future obligation, the court, on the application of the enforcement debtor, should have the discretion to exempt such portion of the obligation from attachment as the enforcement debtor can establish is required to pay expenses that were, or will necessarily be, incurred for the enforcement debtor to maintain the future obligation.

The court should have the discretion to impose such terms as are necessary to ensure that the exempted portion of the obligation is used for the purpose for which it is required.

The discretion should not permit the exemption of a portion of a debt that is payable to the enforcement debtor at the time of the service of the garnishee summons.

RECOMMENDATION 78 RESPONSE BY THE GARNISHEE

In the case of garnishment of a future obligation, the garnishee should be required to file a response to the garnishee summons that either acknowledges or denies the existence of the legal relationship upon which the garnishment is founded.

A garnishee who acknowledges the legal relationship should state when it is expected that the future entitlement will become payable and the nature of the contingencies affecting the future entitlement.

Where a renewal garnishee summons is served, a new response should be required from the garnishee.

The garnishee summons should make it clear to a garnishee who denies the existence of the legal relationship that the garnishee summons remains in force, notwithstanding the denial.

RECOMMENDATION 79 SANCTION FOR GARNISHEE'S FAILURE TO RESPOND

If a garnishee fails to file any of the responses that he or she is required to file after the service of the garnishee summons or during the currency of the garnishment, the enforcement creditor should be able to apply for judgment against the garnishee.

On the application, the failure of the garnishee to respond to the summons should give rise to a rebuttable presumption that the garnishee is indebted to the debtor for the full amount claimed in the garnishee summons.

The garnishee should not be estopped from raising in answer to such an application anything that might have been stated in a required response, and no judgment should be awarded against the garnishee except for the amount that would have been payable to the sheriff under the garnishee summons had the garnishee complied with the procedural requirements.

If the application would have been unnecessary had the garnishee complied with the procedural requirements, costs of the application should be awarded against the garnishee notwithstanding that the enforcement creditor is not granted judgment.

The level of costs should be high enough to encourage garnishees to file the answers required by the procedure.

RECOMMENDATION 80 GARNISHEE SET-OFFS

A garnishee should be able to raise any set-off against the enforcement debtor that exists at the time of the garnishment.

A set-off arising after service of a garnishee summons, however, should not be effective as a response to the garnishment unless the garnishee establishes:

a) that the set-off arose pursuant to a binding commitment entered into before service of the garnishment, or

b) that it would be inequitable to deny the set-off.

RECOMMENDATION 81 ATTACHMENT OF AN INSURED CLAIM

Where the garnishee is insured with respect to an attached future entitlement, the garnishee should be permitted to direct the insurer to pay the appropriate portion of the insurance proceeds to the sheriff when liability of the garnishee to the debtor is determined. The insurer should be required to comply with the undertaking.

If the insurer fails to comply, the garnishee should be able to seek indemnity from the insurer in the proceedings brought by the creditor against the garnishee for judgment and should be indemnified if it is established that the garnishee was entitled to insurance coverage and the direction was given.

RECOMMENDATION 82 PAYMENTS INTO COURT IN THE PROCEEDINGS BETWEEN THE GARNISHEE AND THE ENFORCEMENT DEBTOR

Where a contingent future obligation is attached, the garnishee should still be able to make a payment into court to effect a compromise of the litigation or in the course of interpleader proceedings. The garnishee should, however, be obliged to give notice of the garnishment to the clerk of the court.

If the payment in is accepted by the enforcement debtor, the clerk of the court should not make payment out to the enforcement debtor but should be required to pay in accordance with the garnishment.

RECOMMENDATION 83 ONE GARNISHMENT PROCESS

The same procedure should be used for the attachment of present obligations as is used for the attachment of future obligations. The forms should be designed for use in either situation and should clearly communicate to the garnishee the full extent of his or her obligations depending on the nature of the materials filed in support of the garnishment.

RECOMMENDATION 84 CONDITIONS AFFECTING ATTACHABLE DEPOSITS

There should be a statutory list of conditions, similar to the list contained in the English *Supreme Court Act*, 1961, that are deemed not to prevent attachment of a deposit held by an enforcement debtor.

RECOMMENDATION 85 JUDICIAL DISCRETION REGARDING CONDITIONS OR CONTINGENCIES

The court, on application of the enforcement creditor, should be authorized to order:

a) that the condition affecting the debt otherwise attached be waived and the garnishee required to make payment into court, notwithstanding the condition, where the court is satisfied that such an order would cause no prejudice to the garnishee;

b) that the enforcement debtor satisfy the condition, where the court is satisfied that such an order would cause the enforcement debtor no unreasonable prejudice, or

c) that some alternative action be taken to permit the garnishee to make payment pursuant to the garnishee summons, notwithstanding the condition, without suffering prejudice.

No such order should have the effect of requiring the garnishee to make payment into court pursuant to the garnishee summons before the earliest time that he or she could have been required to make such payment pursuant to the terms of his or her relationship with the enforcement debtor.

RECOMMENDATION 86 RETENTION OF WAGE GARNISHMENT

Wage garnishment should be retained as a remedy for judgment creditors.

RECOMMENDATION 87 PROHIBITION ON TERMINATION

The receipt of a garnishee summons by an employer should never be acceptable as a justification, even a partial justification, for dismissal of an employee. Section 115 of the *Employment Standards Code* should be amended by removing the word "sole".

RECOMMENDATION 88 GARNISHMENT OF CURRENT WAGES

A garnishee summons should be effective only in respect of wages payable for the current pay period if it is served 10 days before pay-day. If the pay period is less than 10 days, then the summons should be effective if served five days before pay-day.

RECOMMENDATION 89 FUNDS IN COURT

Garnishment should replace both the stop order and the ECA, section 7, application as the means by which an enforcement creditor can attach a fund in court to which the enforcement debtor is, or might become, entitled. The creditor wishing to enforce against funds in the hands of the clerk should serve a garnishee summons.

RECOMMENDATION 90 RETENTION OF EQUITABLE RECEIVERSHIP

The remedy of receivership should be maintained as an enforcement process available to creditors who have filed writs of enforcement with the sheriff in cases where no other remedy is available or where the available remedy cannot be used effectively.

RECOMMENDATION 91 JUDICIAL INVOLVEMENT

Receivership should be initiated by order of the court. Its availability should continue to be at the discretion of the court, and the court should tailor the remedy to suit the circumstances of the case in which it will be used.

RECOMMENDATION 92 PRINCIPLE GOVERNING DISCRETION

The appointment should be made where the standard enforcement processes cannot be employed effectively and it is just and convenient that a receiver be appointed. The courts should be given a list of factors that can be considered in determining whether or not the appointment is just and convenient. The statute should also make it clear that the remedy is available whether or not the asset is one that is susceptible to the standard enforcement processes. It should also be available regardless of the nature of the impediment or hindrance that prevents use of a standard enforcement process.

RECOMMENDATION 93 SPECIFIC ASSETS

A receivership should be granted only for a specific asset or class of assets. It should not be ordered for the exigible assets of the debtor generally.

RECOMMENDATION 94 THE RECEIVER

A person who is competent and willing to carry out the tasks that will be required in the particular situation, and whose integrity is warranted, should be appointed as a receiver. This might be the sheriff, or in the proper case, and subject to the proper controls, even the creditor.

RECOMMENDATION 95 POWERS AND DUTIES OF THE RECEIVER

The statute should provide that the court can grant the receiver whatever powers are necessary to carry out the receiver's responsibility. There should be no limitation as to the kinds of powers that the court can give the receiver. The powers should be tailored to fit the circumstances. For the sake of clarity, the statute should provide a non-exhaustive list of specific powers that the court might grant. The statute should also list the minimum duties of the receiver.

RECOMMENDATION 96 COURT-FASHIONED ENFORCEMENT PROCESS

The court should have the power to give directions for enforcement against a specific asset when the standard enforcement processes are not suitable. The process ordered should ensure the protection of all interests that require protection.

RECOMMENDATION 97 *IN PERSONAM* REMEDY

Where the sheriff has been unable to realize a specific exigible asset of the debtor because of the interference of the debtor, or for any other reason, the court should have the power to grant an *in personam* order requiring the debtor, if it is within the debtor's power to obey, to deliver up the asset for enforcement or to take any other steps possible to make the asset available for enforcement or to effect a liquidation of the asset or the completion of a sheriff's sale.

RECOMMENDATION 98 THE CHARGING ORDER

The charging order remedy established by the *Judgments Act, 1838* should be abolished.

The charging order procedure provided by the *Partnership Act* for enforcement against a debtor's interest in a partnership should be abolished and replaced by a receivership procedure that accomplishes the same purpose and gives the same protection to other partners.

RECOMMENDATION 99 STRUCTURE OF THE EXEMPTIONS SYSTEM

The present overall structure of the exemptions system should be continued, whereby protection is given to:

a. property that is required to meet basic necessities such as food, clothing and shelter;

b. property that is required by the debtor to earn a livelihood; and

c. a portion of the debtor's income from employment.

The approach taken in the current statute to avoid obsolescence and promote currency of the descriptions of exempt property, through the use of general descriptions for the classes of exempt property with monetary or other forms of limitation, should be continued.

The exemptions provisions should be restructured so that their central focus is not on the participants in any one industry, such as agriculture. Exemptions appropriate for a specific class of debtors should be stated separately from those appropriate for all debtors.

There should be some mechanism to ensure that the monetary limits are altered to account for inflation.

RECOMMENDATION 100 FOOD

There should be an exemption for such food, and products from which food can be made, as is sufficient to provide for the reasonable needs of the debtor and for the debtor's dependants, for the next 12 months.

RECOMMENDATION 101 CLOTHING

There should be an exemption for the necessary clothing of the debtor and for the debtor's dependants.

RECOMMENDATION 102 SHELTER

The present shelter exemption, which exempts the rural debtor's home (one quarter section) regardless of its value, and the urban debtor's home if the debtor's equity in it is less than $40,000, should be continued subject to a reconsideration of the adequacy of the monetary limit.

The rural exemption should apply, however, only if the debtor gains the primary portion of his or her livelihood from farming land that includes the land on which the house is located; otherwise, the rural home should be subject to the same exemption provision as an urban home.

Where the debtor's equity exceeds $40,000 and the house is sold and $40,000 is paid to the debtor, the fund or any portion of it should be exempt from enforcement in the debtor's hands for six months provided the debtor is able to establish that the source of the fund for which such exemption is claimed is the exempt proceeds of an enforcement sale.

Where the debtor owns the exempt home jointly or as a tenant in common with another or others, the exemption limit should be reduced. Only that portion of the standard exemption ($40,000) that equals the debtor's portion of the total equity held by all the co-owners should be exempt. For the purpose of calculating the exemption in such a situation, each joint tenant should be presumed to have an equal share in the equity of the house. The house should not be exempt from enforcement sale if the debtor's share of the equity exceeds the appropriate portion of $40,000.

The monetary limit prescribed by the provision, $40,000 at present, should be adjusted periodically in response to inflation. The process of adjustment should be that recommended below.

RECOMMENDATION 103 FURNITURE

The present exemption of furniture and household furnishings and household appliances to the value of $4000 should be continued, with this monetary limit being adjusted periodically in response to inflation.

RECOMMENDATION 104 MOTOR VEHICLE

There should be an exemption for a motor vehicle to the value of $5000. The provision should not require that the motor vehicle be needed by the debtor for employment or any other specified purpose. The provision should be so structured that, where the debtor's only motor vehicle is worth more than $5000, the debtor's equity up to $5000 should be paid to the debtor and should be exempt for 60 days provided that the debtor can establish that any fund for which such an exemption is claimed is indeed the exempt proceeds of the enforcement sale of the motor vehicle. The monetary limit of this exemption should be adjusted periodically in response to inflation.

RECOMMENDATION 105 MEDICAL AND DENTAL EQUIPMENT

There should be an exemption for medical and dental aids and equipment necessary for the debtor and for the debtor's dependants, with no monetary limit.

RECOMMENDATION 106 PERSONAL SENTIMENTAL MEMORABILIA

There should be an exemption for personal sentimental memorabilia to a value of $500. The monetary limit should be adjusted periodically in response to inflation.

RECOMMENDATION 107 FARM EXEMPTIONS

The present exemptions giving specific protection to farm debtors should be continued, but they should not be the central focus of the reformed exemptions provision. The reformed exemptions provision should be arranged so that exemptions generally available for all debtors are given primary focus.

The exemption of "one tractor" should be abolished since it is redundant to the general exemption of "farm machinery" and "farm equipment". To forestall any restrictive interpretation of the general provision on the basis that there was once but is no more a specific tractor exemption, the general exemption should be expanded to include "farm vehicles".

RECOMMENDATION 108 GENERAL LIVELIHOOD EXEMPTIONS

There should be one general livelihood exemption of such personal property as the debtor requires in his or her occupation to a maximum value of $10,000.

The present "tractor", "motor vehicle required in the debtor's trade or calling" and "books of a professional person" exemptions should be abolished.
The monetary limit of $10,000 should be adjusted periodically in response to inflation.

If one item is selected by the debtor for this exemption and it is worth more than $10,000, the item should be sold, but $10,000 of the proceeds should be paid to the debtor and should be exempt for a period of 60 days. If the exemption is claimed for a group of assets, the total value of which exceeds the monetary limit, some part of the group should be sold and the amount of the proceeds representing the unused portion of the exemption should be paid to the debtor on the same basis.

RECOMMENDATION 109 PERCENTAGE EXEMPTION

The amount of a debtor's wages exempt from enforcement should be determined on a percentage basis.

RECOMMENDATION 110 CALCULATION ON NET INCOME

The percentage exemption should be calculated on the debtor's gross employment earnings, minus the basic statutory deductions: income tax; Canada Pension Plan contributions; unemployment insurance premiums; Alberta Health care premiums; and workers' compensation premiums.

RECOMMENDATION 111 MINIMUM EXEMPTION

There should be a minimum wage exemption. The wages of debtors who earn the minimum or less should be completely exempt from enforcement. The minimum monthly exemption should be $800 for a debtor without dependants. The minimum should increase according to a weighting formula, where the minimum for a debtor with no dependants is weighted as 3, a debtor with one dependant is weighted as 5 (minimum exemption 1330), a debtor with two dependants is weighted as 6 (minimum exemption 1596), and thereafter each additional dependant adds one weighting unit.

The minimum exemption for a debtor with no dependants should be subject to periodic review and adjustment for inflation, and if it is altered the minimum exemptions for debtors with various numbers of dependants should be adjusted according to the weighting formula described above.

The employer should rely on information supplied by the debtor in the TD1 (or equivalent) form filed with the employer to determine the number of dependants to use in the calculations. The debtor's spouse should be regarded as a dependant if the debtor has claimed any amount for a "supported" spouse on the that form.

The creditor should continue to have the right to apply for a reduction of the amount of the exemption to reflect earnings of the debtor's spouse.

RECOMMENDATION 112 APPROPRIATE PERCENTAGE

The percentage for the percentage exemption should be 50% of the debtor's earnings in excess of the minimum exemption.

RECOMMENDATION 113 MAXIMUM EXEMPTION

There should be a maximum exemption of triple the amount of the minimum exemption for a debtor without dependants, and the difference between the minimum and maximum exemptions should be constant, regardless of the number of dependants.

RECOMMENDATION 114 PROPORTIONAL ADJUSTMENT OF MAXIMUM AND MINIMUM EXEMPTIONS FOR PORTIONS OF A MONTH

The amount of the maximum and minimum exemptions should be increased or decreased proportionately where the period for which the wages or salary is payable is greater or less than one month, assuming that the debtor has earned income for the whole month. If the debtor is employed only during part of a month, however, the full maximum and minimum exemptions should apply.

RECOMMENDATION 115 SCOPE OF EXEMPTION

The exemption should not apply to income from property. It should apply only to income from employment, which might be defined as including wages, salary, commissions or remuneration for work, however computed.

RECOMMENDATION 116 EXEMPTION OF FUTURE SECURITY PLANS

The government should establish a policy for the exemption from enforcement of future income security plans and should review the present policy for the exemption of insurance contracts from enforcement.

RECOMMENDATION 117 ABSCONDING DEBTOR

The denial of exemptions to debtors who have absconded or who are about to abscond should be abolished; however, exemptions should not apply to property that the debtor has abandoned.

RECOMMENDATION 118 DEBTS ARISING FROM CRIMINAL ACTIVITY

Exemptions should continue not to apply to enforcement of debts arising from criminal activity; however, the language of the provision establishing the exemption should be improved so that it is clear that it does not intend to refer to a restitution order under the Criminal Code.

If otherwise exempt property is sold under this exception, and if the proceeds are greater than those required to satisfy the debt, the surplus should be returned to the debtor. It should not be distributed to other enforcement creditors.

RECOMMENDATION 119 CORPORATIONS

The reformed legislation should provide expressly that exemptions do not apply to corporations or partnerships.

RECOMMENDATION 120 ALIMONY AND MAINTENANCE CREDITORS

Generally, exemptions should not apply to the enforcement of alimony or maintenance judgments and orders; however, a debtor should be entitled to the exemption for wages granted by the regulations under the *Maintenance Enforcement Act*, regardless of whether the alimony or maintenance creditor proceeds under that act or under the general enforcement procedures.

If otherwise exempt property is sold pursuant to this exception, and if there is a surplus of proceeds after the debt is satisfied, the surplus should be returned to the debtor. It should not be distributed to other enforcement creditors.

RECOMMENDATION 121 ROOM AND BOARD CREDITOR

The exception to wage exemptions for debts contracted for board and lodging should be abolished.

RECOMMENDATION 122 CREDITOR FOR PRICE OF EXEMPT PROPERTY

The exemptions provisions should apply to the enforcement of a judgment for the price of the exempt property. The present exception should be abolished.

RECOMMENDATION 123 HOSPITAL CREDITORS

The limited exception created by section 8 of the *Exemptions Act* for hospital creditors should be abolished.

RECOMMENDATION 124 CROWN CREDITORS

The reformed exemptions legislation should provide expressly that the Crown is bound by it.

RECOMMENDATION 125 ADJUSTMENT FOR INFLATION

The lieutenant governor in council should examine the monetary limits for specific exemptions and the minimum wage exemption at least every three years, and the limit or minimum should be adjusted accordingly if it is considered that any of them have been eroded by inflation.

RECOMMENDATION 126 EXEMPTIONS EXIST AS OF RIGHT

The reformed legislation should provide expressly that exemptions, with one exception, are applicable automatically. The procedure mandated by Stevenson D.C.J. in *Carmar Holdings v. Harpe* should be incorporated into the reformed legislation. The exception should be the shelter exemption. Land against which enforcement proceedings are taken should be presumed not to be exempt unless the debtor claims the exemption.

RECOMMENDATION 127 WAIVER OF EXEMPTIONS

Exemptions should not be waivable by the debtor.

RECOMMENDATION 128 RELEVANT TIME

The determination of whether or not property is exempt should be based on the facts at that stage of the enforcement process when the issue of exemptions is relevant. Property exempt at the time of seizure, but no longer exempt at the time of the application for the sale order, should not be considered exempt, and *vice versa*. The exemptions should be considered exemptions from enforcement, and not from seizure.

RECOMMENDATION 129 EXTENDED EXEMPTION

Where the debtor is paid the exempt portion of the proceeds of an enforcement sale, or where exempt property is voluntarily sold by the debtor, the fund should be exempt for 60 days following the conversion, provided that the debtor keeps the fund separate from all other funds. This extended exemption should be lost if the fund is mixed with other funds. In the case of the sale of the debtor's house, the period of the extended exemption should be six months.

RECOMMENDATION 130 SURVIVAL OF EXEMPTIONS

Exemptions from enforcement should continue to apply after the death of the debtor as provided for at present. The debtor's spouse and minor children should be able to claim the deceased debtor's exemptions also where the judgment being enforced was obtained against the estate after the debtor's death.

RECOMMENDATION 131 SELECTION WITHIN THE CLASS

The debtor should continue to have the right to select the particular items in an exempt class of property that shall be exempt. The debtor should be required to make the selection at the time of seizure. If the debtor fails to do so, the selection should be made by the sheriff's officer conducting the seizure.

RECOMMENDATION 132 INSTRUCTION TO SHERIFF

The sheriff should be instructed by the reformed legislation not to seize property that appears to be exempt. The instruction should be subject to the same qualifications as appear now in section 7 of the *Exemptions Act* and in section 45 of the *Seizures Act*.

RECOMMENDATION 133 DISPUTE RESOLUTION

The creditor should continue to have a right to apply for an order declaring any specified property of the debtor to be not exempt from enforcement.

The requirement that the sheriff refer any dispute over the claim of an exemption to the court should be continued.

RECOMMENDATION 134 EXEMPTIONS FROM DISTRESS SEIZURE

The present section 2 of the *Exemptions Act*, which deals with an unrelated matter, exemption from distress seizure by a landlord for rent, should be moved to another appropriate statute, probably the *Landlord and Tenant Act*.

RECOMMENDATION 135 THE SHARING PRINCIPLE

The existing policy foundation of the ECA, the sharing principle, should be retained. The proceeds of enforcement processes against a judgment debtor should be shared among the judgment creditors of that debtor proportionally according to the amount of the creditors' individual judgments.

RECOMMENDATION 136 APPLICATION TO ALL ENFORCEMENT PROCESSES

All monies that come into the sheriff's hands because of the existence of a writ of enforcement, regardless of the process by which the money was raised, should be distributed among enforcement creditors according to the sharing principle.

RECOMMENDATION 137 DIRECT PAYMENTS

The sharing principle should not be applied to direct payments made by an execution debtor to an execution creditor.

RECOMMENDATION 138 SUBSISTING WRITS OF ENFORCEMENT

Distribution of enforcement proceeds should be made only among those creditors whose writs of enforcement or statements as to the status of the judgment debt owed to them have been delivered to the sheriff and have been registered in the Enforcement Registry within the year preceding the distribution.

A writ of enforcement should be considered "subsisting" until one year has elapsed from either the date of its entry in the Enforcement Registry or the date on which the most recent statement of status was registered in the Enforcement Registry.

The present requirements, that a creditor advise the sheriff of any payments received in satisfaction of the judgment debt and of any agreement whereby proceedings under a writ or execution are to be stayed or suspended, should be continued. In the latter case, the writ should cease to be subsisting during the suspension.

RECOMMENDATION 139 PROVINCE WIDE DISTRIBUTION

Distribution of enforcement proceeds should be made on a province-wide basis. Every creditor who has a subsisting writ of enforcement against the debtor in the Enforcement Registry should share, regardless of the sheriff to whom the writ was delivered originally for registration in the Enforcement Registry.

RECOMMENDATION 140 THE CERTIFICATE PROCESS

The certificate procedure contained in the ECA should be abolished.

RECOMMENDATION 141 THE GRACE PERIOD

The 14-day grace period provision should be abolished. The sheriff should make distribution to those creditors in respect of whom he holds a subsisting writ of enforcement at the time that he receives a fund for distribution.

RECOMMENDATION 142 THE RESERVED SHARE

Section 41 of the ECA, which contemplates a judge ordering the sheriff to levy in respect of a claim that a debtor has disputed and the sheriff holding a "reserved share" of the proceeds for the creditor until the claim has been reduced to judgment, should be abolished.

RECOMMENDATION 143 APPLICATION TO THE CROWN

The reformed legislation should provide expressly that it applies to the Crown where the crown debt does not have priority by virtue of statute or crown prerogative.

RECOMMENDATION 144 PREFERRED PAYMENT TO THE ACTIVE CREDITOR

The creditor who instructs and directs an enforcement process that produces a distributable fund should receive a preferred payment of the taxable costs expended in the course of the successful enforcement process plus 15% of the proceeds of the enforcement process, after the taxable costs have been paid. The present priority for the costs of the successful creditor should be abolished. The distributive shares should be calculated after the taxable costs relating to the successful enforcement effort and the preferred payment have been deducted from the enforcement proceeds.

RECOMMENDATION 145 WAGE EARNER PRIORITY

The wage earner priority created by the ECA should not be continued in the reformed legislation. The subject should be left entirely to the *Employment Standards Code,* which should be amended if it does not at present contain all that the Legislature wants to grant by way of special priority to wage earners. The reformed enforcement legislation should require the sheriff merely to honour the preferences and priorities established by other statutes when making a distribution.

RECOMMENDATION 146 DISTRIBUTION OF PROCEEDS OF ENFORCEMENT AGAINST LAND

The sharing principle should apply to the distribution of the proceeds of an enforcement sale of land.

RECOMMENDATION 147 INTERVENING ENCUMBRANCES

An intervening encumbrance on property that is sold in enforcement proceedings should be subordinate only to those writs that were on title before the encumbrance was registered.

As between enforcement creditors, the sharing principle should apply notwithstanding the presence of an intervening encumbrance.

Where "partially exempt" property that is subject to an intervening encumbrance is sold, the amount otherwise payable to the enforcement debtor as exempt proceeds should be reduced by the amount paid out of the proceeds on the intervening encumbrance.

RECOMMENDATION 148 OFF-TITLE WRITS

In the distribution of enforcement proceeds, no distinction should be made between writs that bound the property that is the source of the proceeds and writs that did not.

Registration of writs against the title to debtors' land should be made as easy as possible, if not an automatic consequence of registration of the writ in the Enforcement Registry.

Until automatic registration is possible, the fact that a writ has been registered against the title to a debtor's land, along with a legal description of the land, should be recorded in the Enforcement Registry, for the information of other enforcement creditors.

RECOMMENDATION 149 DISTRIBUTION OF SURPLUS RESULTING FROM ENFORCEMENT OF PRIOR SECURITY INTEREST OR ENCUMBRANCE

A surplus resulting from the enforcement of a security interest in any property bound by a writ should be paid to (or retained by) the sheriff, who should then distribute the funds in the same manner as funds realized through enforcement proceedings, taking into account any exemptions to which the enforcement debtor is entitled.

RECOMMENDATION 150 RULES IN ACT

The basic rules regarding compensation for loss suffered in the course of enforcement proceedings should be set out in the statute.

RECOMMENDATION 151 ENTITLEMENT TO COMPENSATION

A person should have a remedy in respect of an interference or dealing with the person's property in the course of enforcement proceedings only if (a) he or she suffers actual pecuniary loss, or (b) the interference or dealing is a result of misconduct that justifies an award of exemplary damages.

RECOMMENDATION 152 COMPENSATION FOR THIRD PARTIES

Subject to Recommendations 156 and 157, a third person should be entitled to compensation for pecuniary loss suffered as a result of damage to or any interference or dealing with his or her property in the course of enforcement proceedings.

RECOMMENDATION 153 NO COMPENSATION WHERE INTEREST SUBORDINATE TO WRIT

A third person should not be entitled to compensation for pecuniary loss suffered because his or her interest in property is subordinate to a writ of enforcement.

RECOMMENDATION 154 LOSS OF RIGHT TO COMPENSATION THROUGH DELAY

A sheriff who knows of a potential claim against seized property should be required to give notice of the seizure and of the procedure for asserting a claim to the potential claimant.

A potential claimant who does not assert a claim within 14 days after receiving notice should lose any right to compensation that would otherwise have been afforded in respect of the seizure or sale of the property.

Where a claim is asserted within the relevant period, the instructing creditor (or another enforcement creditor, if the instructing creditor does not do so) should then bear the onus of contesting the claim and of applying to the court to determine the issue.

RECOMMENDATION 155 COMPENSATION FOR DEBTORS

An enforcement debtor should be compensated for actual pecuniary loss suffered as a result of someone else's non-compliance with the act in the course of enforcement proceedings.

RECOMMENDATION 156 COMPENSATION FOR CREDITORS

An enforcement creditor who suffers actual pecuniary loss as a result of the negligent performance or non-performance of any of the sheriff's duties under the statute should be entitled to compensation for such loss.

RECOMMENDATION 157 ASSURANCE FUND

Where it is appropriate to compensate a person for loss suffered as a result of enforcement proceedings, the compensation should come from an assurance fund.

RECOMMENDATION 158 FUNDING OF ASSURANCE FUND

The assurance fund should be funded by a levy on enforcement creditors that is included in the fee charged for filing a writ of enforcement in the Enforcement Registry. Writs should be grouped into three levels that are based on their amounts. The levy (and hence the filing fee) should be moderately higher for each successive level.

RECOMMENDATION 159 EXCLUSIVE LIABILITY OF FUND

The assurance fund should be the exclusive source of compensation for any compensable loss suffered by any person as a result of enforcement proceedings.

RECOMMENDATION 160 INDEMNIFICATION OF ASSURANCE FUND

The Crown should be liable to indemnify the assurance fund for a liability incurred through deliberate misconduct or negligence within the sheriff's office.

A creditor upon whose instructions a sheriff takes an action that causes a loss for which the assurance fund is liable should be required to indemnify the fund if the creditor knew or ought to have known that in following the instructions the sheriff would be likely to cause a loss for which the fund could be liable.

A creditor whose negligent or deliberate failure to register required information in the Enforcement Registry causes a loss for which the assurance fund is liable should be required to indemnify the fund.

Creditors who give instructions to the sheriff to take some enforcement step should not in general be required to provide security for their potential obligation to indemnify the assurance fund. On application by a sheriff, however, the court should be able to require a creditor to provide such security.

RECOMMENDATION 161 JUDICIAL DISCRETION

The court should be able to override the specific liability rules set out in the act in special circumstances. These special circumstances would usually relate to the conduct of the various parties. In particular, the court should be able to:

(a) dismiss an action, even where all the statutory requisites for liability are present, or

(b) reduce the damages that would otherwise be payable to a party.

LIST OF RECOMMENDATIONS FROM REPORT 50 -

PREJUDGMENT REMEDIES FOR UNSECURED CLAIMANTS

RECOMMENDATION 1

A statutory prejudgment remedy called the "attachment order" should be created. Attachment orders should only be available in the circumstances and in accordance with the procedure and safeguards set out in this report.

RECOMMENDATION 2

The following mechanisms by which an unsecured claimant may obtain prejudgment relief should be eliminated:

(a) writs of attachment under Rules 485-493 of the Rules of Court;

(b) garnishee summons before judgment under Rule 470(1);

(c) appointment of a receiver of proceeds of an auction sale under Rule 465;

(d) the granting of Mareva injunctions or similar relief under s. 13(2) of the Judicature Act;

(e) the various existing methods of providing security for a claimant whose default judgment is set aside pursuant to Rule 158.

RECOMMENDATION 3

The Court of Queen's Bench should be authorized to grant an attachment order in respect of any claim which could lead to the recovery by the claimant of a money judgment against the defendant.

RECOMMENDATION 4

An attachment order may be granted only where the court is satisfied that

(a) there is a reasonable likelihood that the claimant will recover a money judgment against the defendant;

(b) there are reasonable grounds for believing that the defendant is disposing of or dealing with his property, or is likely to do so (i) otherwise than for the purpose of meeting the reasonable and ordinary business or living expenses of the defendant, and (ii) in a way that is likely to seriously hinder the claimant in the enforcement of any judgment he might get against the defendant; and

(c) it would be just and equitable, taking into account the interests of the claimant, the defendant, and any affected third persons, to grant an attachment order.

RECOMMENDATION 5

An attachment order shall not be used as a means of acquiring jurisdiction to determine the merits of a dispute where the court would not otherwise have or be able to obtain personal jurisdiction over the defendant under the Rules of Court.

RECOMMENDATION 6

(a) A claimant who has commenced proceedings before a foreign tribunal may apply for an attachment order.

(b) The court shall not grant such an application unless it is satisfied that

  (i) a judgment granted by the foreign tribunal would be enforceable in Alberta either by an action on the judgment or by registration of the judgment under the Reciprocal Enforcement of Judgments Act;

  (ii) the defendant has attachable property in Alberta; and

  (iii) the grounds for attachment as set out in Recommendation 4 exist.

RECOMMENDATION 7

The power of the court to issue the writ *ne exeat regno* in civil actions should be abolished.

RECOMMENDATION 8

The property potentially subject to prejudgment attachment should consist of all the defendant's exigible property. Property of the defendant which would be exempt from postjudgment execution should be immune from prejudgment attachment, but there should be no special immunities in the latter case.

RECOMMENDATION 9

Notwithstanding Recommendation 8, a prejudgment attachment order shall not permit the garnishment of a defendant's wages, salary or similar income unless the court is satisfied that no other remedy or combination of remedies is likely to achieve the intended purpose with less serious consequences for the defendant.

RECOMMENDATION 10

The property to be attached shall be determined by the court.

RECOMMENDATION 11

(a) An attachment order should cause no more inconvenience and disruption to the defendant than is considered by the court to be reasonably necessary in order to achieve the object of the order.

(b) Without restricting the generality of paragraph (a), an attachment order should allow the defendant to retain possession and control of the attached property so that he may use it for proper purposes, unless the court is satisfied that such an order would be unlikely to prevent the improper disposition of the defendant's property.

RECOMMENDATION 12

Subject to Recommendation 11 an attachment order may:

(a) prohibit any disposition of or dealing with any property of the defendant, or impose restrictions or conditions on any disposition of or dealing with such property;

(b) order the defendant or any person in possession of the defendant's property to deliver it up to a person identified in the order;

(c) authorize the claimant to issue one or more garnishee summons;

(d) appoint a receiver over any property of the defendant; and

(e) include or be subject to such terms, conditions, and ancillary provisions as the court considers necessary to ensure that the order operates fairly and effectively.

RECOMMENDATION 13

An attachment order under Recommendation 12(a) may provide that it shall apply to such property as may be subsequently identified for that purpose by the sheriff. A list of the property so identified shall be served on the defendant.

RECOMMENDATION 14

A copy of an attachment order affecting an interest in land may be registered against the title to that land in the Land Titles Office.

RECOMMENDATION 15

The value of the defendant's property to be attached shall be fixed by reference to the claimant's claim (including an allowance for prejudgment interest and costs) plus subsisting enforcement orders.

RECOMMENDATION 16

Two or more claimants may be able to combine their applications for an attachment order, in which case the value of the defendant's property to be attached shall be fixed by reference to the several claims of those applicants whom the court is satisfied are entitled to attachment orders, plus subsisting enforcement orders.

RECOMMENDATION 17

For the purpose of Recommendations 15 and 16, the value of a claimant's claim shall be estimated by the court on the basis of the evidence before it.

RECOMMENDATION 18

(a) The value of the property attached under Recommendation 12(b), (c) or (d) shall not exceed the amount determined by the court under Recommendations 15 or 16.

(b) Where the court makes an attachment order under Recommendation 12(a) it may dispense with any monetary limitation on the scope of the order if such a limitation is likely to make the order unworkable or ineffective.

RECOMMENDATION 19

No antecedent interest of any third person in any property shall be adversely affected by an attachment order.

RECOMMENDATION 20

Any money judgment may be enforced against attached property, and the proceeds of enforcement distributed, as if the property had not been attached.

RECOMMENDATION 21

Subject to Recommendation 22, any purported transfer of an interest in attached property shall have the same effect that it would have had if the attachment order had not been made.

RECOMMENDATION 22

(a) Any person who, having received notice or having knowledge of an attachment order, knowingly assists or participates in a disposition of or dealing with property which is inconsistent with the terms of the order may be required, in the discretion of the court,

  (i) to pay compensation in respect of any loss suffered by creditors of the defendant as a result of the disposition or dealing; or

  (ii) to transfer back to the defendant any attached property or interest therein acquired by that person as a result of the disposition or dealing.

(b) For the purpose of this recommendation, a person who assists or participates in a disposition of land against which an attachment order is registered in the Land Titles Office may be presumed to have done so with knowledge of the terms of the order, unless it is established that he did not have such knowledge.

(c) Where a person has incurred a legal duty in favour of someone other than the defendant prior to receiving notice or knowledge of an attachment order, nothing which it is necessary for that person to do in order to discharge that duty shall be regarded, as against him, as participating or assisting in a disposition or dealing which is inconsistent with the terms of the order.

(d) An order under clause (a)(i) shall be for the benefit of all creditors who would be entitled to share in a distribution of monies in the hands of the sheriff as a result of an enforcement order against the defendant, and the respective shares of such creditors in any amount recovered under the order shall be determined in the same manner that their respective shares in monies in the hands of the sheriff as a result of an enforcement order against the defendant would be determined.

(e) An order under clause (a)(ii) shall not affect any interest in the attached property of any person not referred to in paragraph (a).

(f) This recommendation is not intended to limit the power of the court to punish for contempt.

RECOMMENDATION 23

An application for an attachment order shall be made to a judge.

RECOMMENDATION 24

The court may grant an attachment order notwithstanding that the claimant has not commenced an action.

RECOMMENDATION 25

An application for an attachment order may be made *ex parte*.

RECOMMENDATION 26

A claimant making an *ex parte* application for an attachment order shall make full and fair disclosure of all material information known to the claimant.

RECOMMENDATION 27

An affidavit filed in support of an application for an attachment order, or at least one of the affidavits filed in support of the application where more than one is filed, shall state with as much precision as possible the net amount claimed by the claimant from the defendant after allowing for all just set-offs, counterclaims and credits. Such a statement shall not preclude the claimant from recovering a larger amount at the trial of the action.

RECOMMENDATION 28

Every affidavit filed in support of an application for an attachment order shall contain a statement that the affidavit makes full and fair disclosure of all material information known to the affiant, whether that information favours the claimant or not.

RECOMMENDATION 29

An attachment order may be granted or, if already granted, continued, notwithstanding any defect of form in the material relied upon in support of the application for the order.

RECOMMENDATION 30

(a) The defendant, any person claiming an interest in attached property or the person in whose possession the property was at the time of its attachment may have it released from attachment upon providing sufficient alternative security.

(b) The form and amount of the security may be determined by agreement between all interested persons or may be determined by the court, having regard to all the circumstances, including the apparent value of the defendant's interest in the attached property.

RECOMMENDATION 31

Every attachment order shall be served on the defendant as soon as reasonably possible after it is made.

RECOMMENDATION 32

(a) Every attachment order granted on an *ex parte* application shall specify a date after which it shall expire unless it is in the meantime continued beyond that date on an application made on notice to the defendant.

(b) The date so specified shall be not more than 21 days after the date the order is made, unless the court is satisfied that special circumstances exist which justify a later date.

(c) If it would be impractical or inexpedient to hear the claimant's application on notice to continue the *ex parte* attachment order before the order would otherwise expire, the court may extend the order on a further *ex parte* application by the claimant.

RECOMMENDATION 33

Notwithstanding Recommendation 32, a defendant against whom an *ex parte* attachment order has been granted may apply at any time for an order terminating or modifying the attachment order.

RECOMMENDATION 34

(a) Subject to Recommendation 35, on an application to continue or to terminate an *ex parte* attachment order, the issue shall be whether the evidence presently before the court justifies the continuation of the order, rather than whether the *ex parte* order was properly granted in the first instance.

(b) On any such application the claimant shall have the onus of justifying the continuation of the order.

RECOMMENDATION 35

Where a claimant has failed to disclose material information in obtaining an *ex parte* attachment order, the court may terminate or may continue the order, and in either case may make any order as to costs which the court considers appropriate.

RECOMMENDATION 36

The court may terminate an attachment order on the application of the defendant or any affected third person where for any reason it appears to the court that it would be just to do so.

RECOMMENDATION 37

(a) The claimant, the defendant or any affected third person may apply at any time to have an attachment order varied or clarified, and the court may vary or clarify an attachment order in any case where it appears just to do so.

(b) Without limiting the generality of the foregoing, the court may vary an attachment order so as to permit legitimate dispositions of the defendant's property.

RECOMMENDATION 38

(a) A claimant who obtains an attachment order shall file an undertaking in favour of the defendant and third persons to pay any damages, including exemplary damages, or indemnification that the court considers the claimant ought to pay.

(b) The claimant may be required to file any additional undertakings which the court considers appropriate.

RECOMMENDATION 39

The court may require the claimant to provide security for his undertaking or undertakings, in such amount and in such form as the court considers appropriate.

RECOMMENDATION 40

Unless it is otherwise ordered by the court, and subject to Recommendation 32, an attachment order shall terminate:

(a) upon the dismissal, discontinuance or other termination of the claimant's proceeding; or

(b) where the claimant recovers a money judgment against the defendant, at the end of the sixtieth day following the issuing of an enforcement order in respect of the judgment.

RECOMMENDATION 41

(a) The court may authorize the sale or other disposition of attached property where

(i) the property is likely, through physical deterioration or other cause, to depreciate substantially in value prior to the conclusion of the proceedings;

(ii) keeping the property under attachment pending the conclusion of the proceedings would be likely to result in unreasonable costs in relation to its value; or

(iii) for any other reason it appears just and expedient to do so.

(b) The court may require the claimant to provide security for any damages which may be suffered by any person as a result of the sale or disposition of the attached property.

APPENDIX B

EXISTING LEGISLATION
and
RULES OF COURT

EXECUTION CREDITORS ACT

CHAPTER E-14

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Definitions

1 In this Act,

(a) "Court" means the Court of Queen's Bench;

(b) "district" means a judicial district;

(c) "execution" means a writ of fieri facias, and every subsequent writ for giving effect to a writ of fieri facias;

(d) "judge" means a judge of the Court of Queen's Bench;

(e) "subsisting execution" means an execution in the hands of a sheriff other than one that by this Act he is directed to disregard.

Attachment on behalf of creditors

2 Except in the cases where it is otherwise specifically provided by this Act, all property seized or attached by virtue of

(a) a writ of execution,

(b) a writ of attachment,

(c) garnishee proceedings, or

(d) proceedings in the nature of equitable execution,

shall be deemed to have been attached on behalf of all creditors entitled by this Act to share in any money received by the sheriff by reason of the seizure or attachment.

Jurisdiction of sheriff

3 All money realized by the seizure or attachment shall be dealt with and distributed by the sheriff of the district in which the seizure or attachment is made under this Act.

Seizure Under Writ of Execution

Seizure under writ of execution

4(1) A sheriff shall not proceed to make a seizure under a writ of execution until he has been instructed to do so in writing by or on behalf of the execution creditor.

(2) A sheriff is not bound to make a seizure under a writ of execution until he has been furnished with security which he considers to be reasonably sufficient for indemnity in respect of

(a) his fees, charges and expenses, and

(b) any claims for damages that might be incurred by him in making the seizure and levy and anything done in relation thereto.

(3) On the requisite instructions being given and any security required by the sheriff for his indemnity being furnished, the sheriff

(a) shall make a seizure of the exigible goods and chattels sufficient to satisfy all the subsisting writs of execution then in his hands against the judgment debtor,

(b) shall seize for the aggregate amount of all the subsisting executions then in his hands, and

(c) shall set out in his warrant and notice of seizure

(i) the names of all the execution creditors, and

(ii) the aggregate amount for which the seizure is made.

(4) If a sheriff has made a seizure under a writ of execution he shall give notice in writing of the seizure to all persons that at the time of seizure have subsisting executions in his hands.

(5) If the sheriff has made a seizure and the execution creditor on whose instructions the seizure was made instructs the sheriff to release or abandon the seizure at a time at which there are other subsisting executions against the debtor in the hands of the sheriff, the sheriff shall give notice in writing that he has been so instructed to all other persons on whose behalf he has then in his hands a subsisting writ of execution.

(6) If a person on receiving the notice mentioned in subsection (5)

(a) within 10 days after the day on which the notice is mailed gives the sheriff instructions in writing to continue the seizure, and

(b) furnishes the sheriff with the security required by him for his indemnity,

the sheriff shall, in every respect as if that person had been the person who had originally instructed the sheriff to make the seizure, continue the seizure and all proceedings thereunder to the extent of the aggregate of the sums payable under all the subsisting executions then in his hands other than those in respect of which he has been instructed not to seize, or not to continue seizure, or to discontinue, release or abandon the seizure, as the case may be.

(7) The sheriff, on receipt of the instructions referred to in subsection (5) to release or abandon the seizure, shall not release or abandon the seizure until the expiration of the 10 days referred to in subsection (6), unless he is instructed in writing to do so by all persons who at the time of the receipt of the instructions to release or abandon the seizure had subsisting writs of execution in his hands.

(8) If a seizure has been made under a writ of execution any other creditor who has a subsisting writ of execution in the sheriff's hands may by writing require the sheriff to take any proceedings to enforce the executions in his hands that can be lawfully taken by the sheriff, and thereupon on provision being made for the sheriff's fees and expenses and indemnity, if required, the sheriff shall comply with that requirement.

(9) If the sheriff has made a seizure under a writ of execution and subsequent to the seizure receives any other writ of execution, on being instructed to do so and on being furnished with any security required by him for his indemnity, he shall make any further or additional seizure that he considers proper having regard to the amount of money owing under all the subsisting executions then in his hands.

Garnishee Proceedings

Garnishee summons

5(1) On a garnisheeing creditor filing with the clerk of the Court of a district a certificate of the sheriff of that district in the prescribed form, certifying the total amount of the subsisting executions against the debtor in his hands as at the day on which the garnishee summons is to be issued, the clerk at the request of the garnisheeing creditor shall issue the garnishee summons

(a) for the amount of the claim of the garnisheeing creditor, and

(b) for the amount payable in respect of all the subsisting executions other than an execution for the amount of the garnisheeing creditor's claim,

together with costs.

(2) A garnishee summons served on the garnishee as and from the time of service binds each debt due or accruing due from the garnishee to the debtor or so much thereof as is necessary to satisfy the amount set out in the summons

together with the costs payable in respect of the summons under the Alberta Rules of Court.

(3) A garnishee summons issued under this section shall be in the form prescribed by the regulations or by the Alberta Rules of Court.

Availability of money paid into court

6 If money is paid into Court under any garnishee proceedings in the Court, it shall be available for distribution by the sheriff among the execution creditors of the debtor whose debt is garnisheed except when

(a) the money paid into Court is not liable to attachment,

(b) the amount paid into Court does not exceed the sum of $50,

(c) by virtue of any statute or rule of court the money is required to be paid to the debtor as being exempt from attachment, or

(d) it is otherwise ordered by the Court.

Payment to sheriff of fund in court

7 When there is in the Court a fund belonging to an execution debtor or to which he is entitled, the fund or a part thereof sufficient to pay the subsisting executions in the sheriff's hands, on application to the Court by the sheriff or any party interested, may be paid over to the sheriff and the money shall be deemed to be money received by him under execution within the meaning of this Act.

Payment to sheriff under garnishee summons

8(1) Except in cases where it is otherwise specifically provided by this Act, or where it is otherwise ordered by the Court, all money paid into Court by virtue of a garnishee summons shall without an order be paid by the clerk of the Court to the sheriff of his judicial district,

(a) if the garnishee summons is based on a judgment, immediately after the expiration of the 10th day after service of the summons on the judgment debtor and on the garnishee or after any longer period that may be ordered by the Court or judge, or

(b) if the garnishee summons is issued before judgment, immediately on the plaintiff entering judgment against the defendant or at any later time that may be ordered by the Court or judge.

(2) Immediately on the receipt by the sheriff of any money from the clerk of the Court

(a) if there are no subsisting writs of execution against the debtor whose debt was garnisheed or against any of the persons entitled to the money, the sheriff shall immediately pay out the money or the part of the money in respect of which he has no subsisting writs of execution either to the persons entitled by law to receive it or to their solicitors, or

(b) if there is a subsisting execution against the debtor or any of the persons entitled by law to receive the money, the sheriff shall retain the money and shall distribute it as money levied under execution among the creditors of the debtor or the person entitled to receive the money, as the case may be.

Records to be kept by sheriff

9 Immediately on the receipt by the sheriff of any money that is available for distribution among creditors, the sheriff

(a) shall make an entry thereof in a book kept in his office setting out the date of the receipt of the money, and

(b) shall keep any other records and make any other entries prescribed by the regulations.

Distribution of Money

Distribution of money

10(1) Except in cases where it is otherwise specifically provided by this Act and subject to the other provisions of this Act relating to priorities, all money received by a sheriff in respect of an execution shall be distributed immediately after

(a) the expiration of 14 days after the day on which the money is so received, or

(b) any longer period that a judge may order.

(2) The distribution shall be made among those creditors of the execution debtor who have subsisting executions in the hands of the sheriff either

(a) within 14 days after the receipt of the money by the sheriff, or

(b) within any further period, not exceeding 14 days, as a judge may order in a case when it appears to him either

(i) that the money represents the proceeds of all the exigible goods of the debtor, or

(ii) that there are no other goods available to creditors other than those who, within the period of 14 days, had subsisting executions in the hands of the sheriff.

(3) When a sheriff is disbursing money received in respect of an execution he may pay the money to the execution creditor or to the solicitor of the execution creditor.

Costs

11 When a creditor

(a) institutes and continues proceedings for the seizure, garnisheeing or attachment of any property that by this Act he is deemed to have seized or attached on behalf of other creditors, or

(b) instructs continuance of any such proceedings that have been abandoned by the creditor instituting them,

and the proceedings taken by him directly result in payment of any money to the sheriff, then he is entitled to be paid out of the money

(c) his taxed costs subsequent to judgment, and

(d) his costs of all proper and necessary steps or proceedings taken by him for the realization of the money and the payment thereof to the sheriff,

in priority to the claims of the other creditors of the execution debtor entitled by this Act to share in the money.

Distribution when fund insufficient for full payment

12 When the amount received by the sheriff in respect of an execution is not sufficient to pay in full the claims of creditors and the executions with costs, the sheriff shall

(a) firstly, retain his fees,

(b) secondly, in the event of a creditor being entitled under this Act to priority for costs, pay those costs to that creditor or his solicitor,

(c) thirdly, pay the claim of a person who is entitled to be paid in preference to any other creditor, and

(d) fourthly, distribute the balance, if any, ratably among the execution creditors who are entitled to share therein under this Act.

Distribution of money paid without seizure

13 When money is paid to the sheriff in respect of an execution or attachment without a seizure having been made thereunder,

(a) if the amount is sufficient to pay the full amount payable under all executions in the sheriff's hands that are at the time of payment valid and subsisting, or

(b) if the sheriff has at the time of payment no more than one execution in his hands that is then valid and subsisting,

then in either case the sheriff shall deal with the money so paid having regard only to the executions in his hands at the time of payment and that were then valid and subsisting.

Effect of delivery of execution

14 After an execution has been delivered to the sheriff

(a) the subsequent withdrawal or expiration of any other execution on which the proceedings are founded,

(b) any stay on the writ,

(c) the satisfaction of the plaintiff's claim, or

(d) the setting aside of the return of the writ,

does not affect the proceedings under this Act.

Discontinuation of proceedings

15 No proceeding whereby property has been attached by virtue of a writ of attachment, garnishee proceedings or proceedings in the nature of equitable execution shall be discontinued, withdrawn or settled as against a debtor except by leave of a judge, unless at the date of the discontinuance, withdrawal or settlement there are no subsisting writs of execution against the debtor in the hands of the sheriff of the district in which the proceedings are taken.

Priorities

Priority of wage claims

16(1) All persons who

(a) are employed by an execution debtor at the time of or within one month before the seizure under execution in respect of which any money is realized by the sheriff, or

(b) before the expiration of the time fixed for the distribution of the money so realized, file in the office of the sheriff their claim for wages or salary with the particulars thereof proved by affidavit, are, subject to subsection (3), entitled to be paid out of the money so realized the amounts mentioned in subsection (2).

(2) The persons referred to in subsection (1) are entitled to be paid out of the money realized,

> (a) the amount of wages or salary due to each of them by the execution debtor not exceeding wages or salary for 3 months, in priority to the claims of the other creditors of the execution debtor, and
>
> (b) a pro rata share with the other creditors in respect of the residue, if any, of their claims for wages and salary.

(3) This section applies only to wages and salary actually owing and accrued and not for any unearned portion of any wages or salary.

(4) This section applies to wages and salary whether the employment in respect of which they are payable is by the day, week, month or year.

Proceeds of sale

17(1) When money received by the sheriff represents the proceeds of the sale of an article under execution on a judgment rendered in an action for the price of the article, and the article would otherwise be exempt from seizure under the *Exemptions Act*, that money is not liable to distribution among other execution creditors but shall be applied on the execution under which it was levied.

(2) If the amount received by the sheriff is more than sufficient to pay the execution debt with costs in full, the balance in the sheriff's hands shall be paid over to the execution debtor.

(3) If the amount so received is insufficient to pay the execution debt with costs in full, the execution creditor, to the extent of the deficiency, is entitled to share ratably with the other execution creditors in any other money received by the sheriff under execution against the debtor.

Proceedings by Creditors and Claimants

Proceedings by creditors after seizure, etc.

18 When the sheriff has seized goods and chattels under a writ of execution or a debtor allows an execution against his land to remain unsatisfied for 9 months after it has been placed in the sheriff's hands, the proceedings authorized by sections 19 and 20 may be taken by other creditors or claimants in respect of debts that are overdue.

Affidavit of debt

19(1) An affidavit of the debt and the particulars thereof in the prescribed form may be made in duplicate

(a) by the creditor,

(b) by one of the creditors in case of a joint debt, or

(c) by a person cognizant of the facts and authorized by a creditor to do so.

(2) The claimant

(a) shall serve on the debtor a duplicate of the affidavit of claim and a notice in the prescribed form, and

(b) shall send a copy of the notice to each creditor who has a subsisting execution in the hands of the sheriff or to his solicitor or agent.

(3) If the affidavit and notice are to be served outside of Alberta, a judge by order may fix the time after which the next step may be taken by the claimant as hereinafter provided.

(4) The claimant shall file a duplicate of the affidavit of claim and a copy of the notice with an affidavit of service thereof in the prescribed form with the clerk of the Court of the district the sheriff of which has the execution.

(5) Before or at the time of filing the affidavit with the clerk of the Court, there shall be filed with him a certificate of the sheriff or an affidavit showing

(a) that proceedings have been had against the debtor that entitle the creditor to proceed under this Act, and

(b) the names of the creditors who have in the sheriff's hands subsisting executions.

(6) An execution debtor may by notice in writing to the sheriff furnish him with the address for service within Alberta of all notices and other documents, and the sheriff shall make an entry thereof in his books.

(7) If the notice served on a debtor

(a) does not state some place, within 16 kilometres of the office of the clerk of the Court of the district within which the proceedings are being taken, at which service may be made on the claimant, or

(b) does not give the name and address of some solicitor within Alberta who may be served on the claimant's behalf,

good and sufficient service of a notice, paper or document may be made on the claimant by posting up the paper or document in the office of the clerk of the Court.

Certificate of judgment

20(1) When a claim made is not contested in the manner set out in section 21, then, on the application of the claimant and on his filing proof of due service of the affidavit and notice, the clerk of the Court shall, after

(a) 10 days from the date of service if it was made within Alberta,

(b) the time fixed by the order under section 19(3) if the service was made outside Alberta,

(c) 20 days from the date of service if it was made in Canada and outside Alberta and no order was made under section 19(3),

or

(d) 25 days from the date of service if it was made in the United States of America and no order was made under section 19(3),

make out and enter a certificate of judgment in the prescribed form for the amount of the claim and costs.

(2) When the claim is contested and the dispute is determined wholly or partly in favour of the claimant, the clerk shall make out and enter the certificate of judgment for the amount, including costs, if any, allowed the claimant.

(3) When the claim is disputed with regard to a part only, the claimant may elect by a document in writing filed with the clerk to abandon that part and the clerk shall make out and enter a certificate of judgment for the residue and costs.

(4) Each certificate of judgment made out and entered pursuant to this section is a judgment of the Court and is enforceable in any manner in which a judgment may be enforced.

Contesting claim

21(1) The claim referred to in sections 18 and 19 may be contested by the debtor or by a creditor of the debtor.

(2) If the debtor contests the claim he shall file with the clerk an affidavit stating that he has a good defence to the claim or to a specified part of it on the merits, but a judge may dispense with the affidavit on terms or otherwise.

(3) The debtor shall file the affidavit

(a) within 10 days after service on him of the affidavit of claim and the notice,

(b) within the time fixed by order of a judge, or

(c) within any further time that a judge may allow.

(4) When a creditor contests the claim, he shall file with the clerk an affidavit to the effect that he has reason to believe that the debt claimed is not in fact and in good faith due from the debtor to the claimant, but a judge may dispense with the affidavit on terms or otherwise.

(5) Notice that the claim is contested, whether by the debtor or by a creditor, together with a copy of the affidavit, if any, shall be served on the claimant within 5 days after the affidavit has been filed or after the order has been made by the judge if the affidavit is dispensed with.

(6) The affidavit by a creditor may be filed and a certified copy of it delivered to the sheriff at any time before the money claimed is distributed, and the sheriff shall forthwith give notice of the receipt of the certified copy to the claimant and all creditors of the debtor who then have subsisting executions in his hands.

(7) The affidavit of the debtor or other contestant shall have endorsed thereon a statement of some place within 5 kilometres of the office of the clerk at which service may be made on him, or the address of a solicitor within Alberta who may be served on his behalf, and in default thereof service of a notice, paper or document may be made on the debtor or contestant by filing it in the office of the clerk.

(8) If the address given for service is that of a solicitor and it is not within 5 kilometres of the clerk's office, service may be made on the solicitor by sending papers by registered mail to him at the address given.

Hearing

22(1) A judge may, on notice being given to any persons he considers proper, proceed to hear and determine in a summary manner the application of a claimant whose claim is contested and for that purpose may

(a) receive evidence either orally or by affidavit, or both,

(b) make an order

(i) allowing the claim and determining the amount thereof, or

(ii) disallowing the claim,

and

(c) make any order as to the payment of costs that he thinks proper in the circumstances.

(2) If a claimant who has received notice that the claim is contested does not apply to a judge to hear and determine the contest within the period of 10 days after the receipt of the notice or within any further time that a judge may fix by order either before or after the expiration of 10 days, he shall be deemed to have abandoned his claim.

(3) On the application of a creditor, the judge by order may give leave to that creditor to intervene in a contest on the claim if it appears to the judge that a contest on that claim is not being carried on in good faith by any other creditor.

Effect of execution pending distribution

23 Notwithstanding the expiration of an execution before the termination of 14 days after the date of entry of the receipt by the sheriff of any money available for distribution among creditors under this Act, the execution, so far as it relates to any money so received, remains in force until the money has been distributed.

Levy by sheriff

24 When a claim is contested by a creditor after the execution based on the certificate of judgment has been placed in the sheriff's hands, the sheriff, unless the judge otherwise orders,

(a) shall levy as if the claim had not been contested,

(b) until the determination of the contest shall retain in a bank or treasury branch the amount that would be apportionable to the claim if valid, and

(c) as soon after the expiry of the period of 14 days as is practicable shall distribute the residue of the money made from the levy among those entitled.

Sum in controversy

25 If the sum in controversy does not exceed the sum of $200 the determination of the judge is binding and conclusive on all the parties thereto, and no appeal lies therefrom.

Proceedings before application

26 Before the application to the judge and as a foundation for the application, the same proceedings may be taken for the production of documents and for the examination of parties or others as may be taken in an ordinary action.

Records of Clerk and Sheriff

Recording certificate of judgment

27(1) The clerk of the Court on making out a certificate of judgment shall make an entry thereof in an appropriate book with the following particulars:

(a) the name and address of the claimant and of the debtor,

(b) the date of the entry,

(c) the amount of the debt exclusive of costs,

(d) the amount of costs, and

(e) if the proceedings have been set aside, that fact and, briefly, the reason therefor.

(2) The clerk shall index the entries alphabetically in a book under the names of the debtors.

(3) If the original papers are lost or destroyed an entry made under this section shall be deemed to be an entry of final judgment and a copy certified by the clerk is conclusive proof thereof.

Payments

28 If

(a) an execution creditor

(i) receives any money on account of an execution debt,

(ii) receives anything by way of satisfaction, either wholly or in part, of an execution debt, or

(iii) enters into an agreement whereby proceedings under a writ of execution are to be stayed or suspended,

or

(b) an order is made staying the execution,

the execution creditor shall immediately thereafter deliver to each sheriff to whom the writ of execution has been delivered a notice in writing setting out with particularity each payment, satisfaction or agreement, or a certified copy of each order, as the case may be.

Term of writ of execution

29(1) The sheriff shall disregard every writ of execution that is in his hands, as the case may be,

(a) after the expiration of the period of one year from the time of the delivery of the writ of execution to him, or

(b) after the expiration of the period of one year

(i) from the date of the delivery of the last statement made pursuant to section 28 with respect to the execution, or

(ii) after the delivery to him of a notice in writing by the creditor or his agent setting out the amount leviable under the writ of execution.

(2) Each writ that the sheriff by this section is directed to disregard shall be deemed not to be a subsisting execution.

(3) The sheriff on receipt of any notice referred to in this section shall make an entry with respect thereto as if it were a statement given under section 28.

Failure to make return by creditor

30 If a creditor fails to make a return that he is required to make pursuant to this Act and by reason of the failure

(a) the sheriff makes an excessive or wrongful levy, or

(b) a creditor makes an excessive or wrongful attachment,

the creditor is liable for any damages occasioned thereby and no action is maintainable against the sheriff in respect thereof.

Distribution When Money Insufficient

Distribution statement when money insufficient

31(1) If at the time fixed by this Act for distribution the money realized is insufficient to pay all claims in full, the sheriff shall immediately prepare for examination by the debtor and his creditors a statement setting out the creditors entitled to share in the distribution with the amount due to each for principal, interest and costs.

(2) The statement shall be arranged to show the amount payable to each creditor and the total amount to be distributed, and the sheriff shall deliver or send by registered mail to the debtor and to each creditor or his solicitor a copy of the statement.

(3) If no objection as provided by this Act is made within 10 days after all the copies of the statement have been delivered or posted or within any further time that a judge may allow, the statement is final and conclusive as between all persons and the sheriff, and the sheriff shall make distribution forthwith pursuant to the statement.

(4) If objection is made, the sheriff shall forthwith distribute ratably as much of the money realized and among such persons as will not interfere with the effect of the objection if it should be allowed.

(5) A person affected by the proposed scheme of distribution may contest it by giving, within the time mentioned in subsection (3), a notice in writing to the sheriff stating his objection to the scheme and the grounds thereof.

(6) Unless the person contesting the scheme of distribution applies within 10 days thereafter to a judge for an order adjudicating on the matter in dispute, the objection shall be deemed to be abandoned.

(7) The person contesting the scheme of distribution, within the time mentioned in subsection (6), shall obtain from the judge an appointment for hearing and determining the matter in dispute.

(8) A copy of the appointment and a notice in writing in the prescribed form of the objections, stating the grounds thereof, shall be served by the person contesting the scheme of distribution

(a) on the debtor, unless he himself is the debtor,

(b) on the creditors or such of them as the judge may direct, and

(c) on the sheriff.

(9) The judge may

(a) determine a question in dispute in a summary manner, or

(b) direct an action to be brought or an issue to be tried in any district for the determination of a question in dispute,

and make any order relating to the costs of the proceedings that he considers just.

(10) When an issue is directed, the trial shall take place, and all proceedings subsequent thereto shall be the same as if it had been an action in the Court in which the issue is ordered to be tried.

(11) If the sum in controversy does not exceed $200 the determination of the judge is binding and conclusive on all the parties thereto, and no appeal lies therefrom.

(12) If a claimant is held to be not entitled, or to be entitled to only part of, his claim,

(a) the money retained pending the determination of the dispute, or

(b) the portion thereof to which the claimant has failed to establish his claim, as the case may be, shall be distributed among the creditors who would have been entitled thereto, and in the same manner as it would have been distributed had the claim not been made.

Apportionment of costs

32 When several creditors are interested in a contested claim, either for or against it, the judge

(a) shall give directions for saving the expense of an unnecessary number of parties and trials and of unnecessary proceedings as he considers just, and

(b) shall direct by whom and in what proportions any costs incurred in the contest or in any proceedings thereunder shall be paid and what costs, if any, shall be paid out of the money levied.

Rights of creditors in interpleader proceedings

33 When proceedings are taken by the sheriff for relief under any provisions relating to interpleader, only those creditors

(a) who are parties thereto, and

(b) who agree to contribute pro rata to the expense of contesting an adverse claim, in proportion to the amount of their executions or certificates,

are entitled to share in any benefit that might be derived from contesting the claim so far as is necessary to satisfy their execution or certificates.

Undertaking interpleader proceedings

34 The judge may direct that one creditor is to undertake the interpleader proceedings on behalf of all creditors interested.

Costs of interpleader proceedings

35 The costs of interpleader proceedings as between solicitor and client are a first charge on the money or goods that are found by the proceedings to be available to satisfy the executions or certificates.

Poundage

36 When money is to be distributed under this Act the sheriff is entitled only to the fees prescribed by the regulations.

General

Memorandum re amount paid under execution

37 When money is realized under an execution the money shall be taken, for the purposes of the sheriff's return and all other purposes, to be realized on all the executions and certificates entitled to the benefit of the execution and the sheriff, on payment being made to the creditor named in any such execution or certificate, shall endorse thereon a memorandum of the amount so paid but he shall not, except

(a) on the request of the party who issued the writ, or

(b) by direction of a judge,

return the writ until it has been fully satisfied or unless it has expired by effluxion of time, in which case the sheriff shall make a formal return of the amount paid thereon.

Compelling payment

38 The same proceedings may be taken to compel payment by the sheriff of money payable in respect of an execution or other claim as may be had to compel the return by the sheriff of a writ of execution.

Application for directions

39 When any question, doubt or difficulty arises with regard to the exercise by the sheriff or the clerk of the Court of any power, duty or authority conferred on him by this Act, he may on his own motion apply to the Court for directions and on the application the Court may

(a) fix the length and manner of notice to be given to the parties which it in its discretion thinks proper, and

(b) after hearing any evidence, either orally or by affidavit, which it thinks proper,

make an order giving any directions not inconsistent with this Act that it in its discretion considers proper and convenient, and no action or proceeding lies against the sheriff or clerk for anything done pursuant to or in conformity with any direction so given.

Deposit of receipts

40 Every sheriff shall deposit all money received by him in respect of an execution or other proceeding under this Act in the banks or treasury branches and in the manner the Lieutenant Governor in Council from time to time designates.

Order to levy

41(1) The judge may direct the sheriff to levy for an amount sufficient to cover a claim that is in dispute or part thereof.

(2) If it appears to the judge that it is improbable that the debtor has other sufficient property, he may direct the sheriff to retain in his hands during the contesting of a claim the share of money in his hands that, if the claim is sustained, will be apportionable to the claim or a part thereof.

(3) An order to levy under this section confers on the sheriff the same authority as he has under an execution.

Appeal

42 If any party contesting a claim or matter on which a judge has rendered or made a final judgment or order is dissatisfied therewith and the contest involves a sum greater than $200, he may appeal therefrom to the Court of Appeal as nearly as possible according to the practice in force in respect of appeals from the Court.

Decision binding

43 The decision of the Court of Appeal on an appeal binds the debtor and all his creditors unless it appears that the decision was obtained by fraud or collusion.

Service of notice

44(1) Unless this Act contains express provisions to the contrary, a notice required to be served on a person pursuant to this Act may be served by sending it by registered mail in a prepaid cover addressed to that person at his last known post office address.

(2) Proof that the notice was properly served may be made by affidavit stating

(a) that the notice was sent by registered mail in a prepaid envelope addressed to the person to be served at his last known post office address,

(b) the date and place of mailing of the registered letter, and

(c) the date at which the registered letter would, in the ordinary course of mail, reach its destination.

(3) The date mentioned in subsection (2)(c) shall be deemed to be the date of service of the notice.

Taking of evidence

45 On any proceeding before a judge the evidence may be taken orally or by affidavit as the judge directs.

Application of other Acts

46 The provisions of the *Court of Queen's Bench Act*, the *Judicature Act* and the Alberta Rules of Court apply to proceedings under this Act except where inconsistent with this Act or any regulations made under this Act.

Defect of form

47(1) No proceeding under this Act is void for any defect of form, and the Alberta Rules of Court relating to amending or otherwise curing irregularities or defects apply to all proceedings under this Act.

(2) Proceedings wrongfully taken under this Act may be set aside by the judge with or without costs as he thinks fit.

Regulations

48 The Lieutenant Governor in Council may make regulations

(a) relating to the procedure to be followed and the forms to be used in any proceeding under this Act;

(b) prescribing a tariff of the fees payable to the clerk or to the sheriff in respect of any proceedings under this Act.

EXEMPTIONS ACT

CHAPTER E-15

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Property exempt from seizure

1(1) The following real and personal property of an execution debtor is exempt from seizure under a writ of execution:

(a) the necessary and ordinary clothing of the execution debtor and his family;

(b) furniture and household furnishings and household appliances to the value of $4000;

(c) cattle, sheep, pigs, domestic fowl, grain, flour, vegetables, meat, dairy or agricultural produce, whether or not prepared for use, or such of them as will be sufficient either themselves or when converted into cash to provide

(i) food and other necessaries of life required by the execution debtor and his family for the next 12 months,

(ii) payment of any money necessarily borrowed or debts necessarily incurred by the execution debtor

(A) in growing and harvesting his current crop, or

(B) during the preceding period of 6 months, for the purpose of feeding and preparing his livestock for market,

(iii) payment of current taxes and one year's arrears of taxes or in case taxes have been consolidated, one year's instalment of the consolidated arrears, and

(iv) the necessary cash outlays for the ordinary farming operations of the execution debtor during the next 12 months and the repair and replacement of necessary agricultural implements and machinery during the same period;

(d) horses or animals and farm machinery, dairy utensils and farm equipment reasonably necessary for the proper and efficient conduct of the execution debtor's agricultural operations for the next 12 months;

(e) one tractor, if it is required by the execution debtor for agricultural purposes or in his trade or calling;

(f) either

  (i) one automobile valued at a sum not exceeding $8000, or

  (ii) one motor truck,

required by the execution debtor for agricultural purposes or in his trade or calling;

(g) seed grain sufficient to seed the execution debtor's land under cultivation;

(h) the books of a professional person required in that person's profession;

(i) the necessary tools and necessary implements and equipment to the value of $7500 used by the execution debtor in the practice of his trade or profession;

(j) the homestead of an execution debtor actually occupied by him, if it is not more than one quarter section, but if it is more, the surplus may be sold subject to any lien or encumbrance on it;

(k) the house actually occupied by the execution debtor and buildings used in connection with it, and the lot or lots on which the house and buildings are situated according to the registered plan thereof, if the value of the house, building and the lot or lots does not exceed $40 000, but if the value does exceed $40 000, the house, building and lot or lots may be offered for sale and if the amount bid at the sale after deducting all costs and expenses exceeds $40 000 the property shall be sold and the amount received from the sale to the extent of the exemption shall be paid at once to the execution debtor and is until then exempt from seizure under any legal process, but the sale shall not be carried out or possession given to any person until the execution debtor has received $40 000;

(l) the mobile home actually occupied by the execution debtor if the value of the mobile home does not exceed $20 000, but if the value does exceed $20 000 the mobile home may be offered for sale and if the amount bid at the sale after deducting all costs and expenses exceeds $20 000 the mobile home shall be sold and the amount received from the sale to the extent of the exemption shall be paid at once to the execution debtor and is until then exempt from seizure under any legal process, but the sale shall not be carried out or possession given to any person until the execution debtor has received $20 000.

(2) This section does not apply

(a) when the execution debtor has absconded or is about to abscond from Alberta, leaving no wife or husband or minor children within Alberta, or

(b) to an execution issued on a judgment or order

(i) for the payment of alimony or for the payment of maintenance by a person to that person's spouse or former spouse, as the case may be,

(ii) for the payment of maintenance for any child of the execution debtor,

(iii) for restitution made under the *Criminal Code* (Canada), or

(iv) for damages and costs, if any, arising out of an act in respect of which the execution debtor was convicted of an offence under the *Criminal Code* (Canada).

Exemption from seizure under distress

2(1) The following goods and chattels are not liable to seizure under distress by a landlord for rent:

(a) the beds, bedding and bedsteads, including carriages and cradles, in ordinary use by the debtor and his family;

(b) the necessary and ordinary wearing apparel of the debtor and his family;

(c) one cooking stove with pipes and furnishings, one other heating stove with pipes, 2 towels, one wash-basin, one kitchen table, one tea kettle, one teapot, one saucepan, one refrigerator, one freezer, one washer, one dryer and one frying-pan;

(d) for each member of the debtor's family, one chair, one cup and saucer, one plate, one knife, one fork and one spoon;

(e) all necessary fuel, meat, fish, flour and vegetables for the ordinary consumption of the debtor and his family for 30 days;

(f) the tools or agricultural implements used by the debtor in the practice of his trade or occupation to the value of $1000;

(g) one axe and one saw.

(2) This section does not apply when the tenant debtor has absconded or is about to abscond from Alberta, leaving no spouse or minor children within Alberta.

3 Repealed 1984 c51 s4.

Seizure of article when judgment obtained

4 Nothing in this Act exempts from seizure an article the price of which forms the subject matter of the judgment on which the execution is issued, except articles intended for the food, clothing and bedding of the execution debtor and his family.

Rights of family of deceased debtor

5 In case of the death of an execution debtor, his property that is exempt from seizure under execution is exempt from seizure under execution as long as the property

(a) is in the use and enjoyment of

(i) the surviving spouse and minor children, or

(ii) the surviving spouse or minor children,

of the deceased, and

(b) is necessary for the maintenance and support of the surviving spouse and minor children or any of them.

Selection of chattels for exemption

6 When

(a) an execution debtor holds or his estate contains a greater quantity of chattels of a kind exempted from seizure by virtue of sections 1 and 2 than are exempt, or

(b) the estate of a deceased execution debtor contains a greater quantity of chattels so exempt than are necessary for the maintenance and support of his surviving spouse and minor children or any of them,

the execution debtor, or his surviving spouse or family or in the case of minors, their guardian, as the case may be, may select from chattels of the same kind the chattels that are exempt from seizure.

Seizure of exempt goods

7(1) A person authorized to execute a seizure shall not seize any goods that appear to him to be exempt from seizure under this Act, but no liability attaches to that person if in good faith he seizes goods which are later shown to be so exempt.

(2) A creditor, on notice of motion to the debtor, may apply to the Court of Queen's Bench for an order declaring any specified goods of the debtor to be not exempt from seizure under this Act.

Exemption from seizure on hospital judgment

8 The personal property set out in section 1(1)(c)(ii), (iii) and (iv) is not exempt from seizure under an execution issued upon a judgment for a debt owing to a hospital for hospital services, but the amount recoverable on the execution by the seizure of that property shall not exceed in any calendar year the sum of $200.

Dispute re exemptions

9 If a claim is made for exemptions and a dispute arises in respect of the claim, the sheriff on his own motion shall refer the matter to the Court of Queen's Bench for summary determination, on such notice as the Court may direct.

SEIZURES ACT

CHAPTER S-11

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Definitions

1 In this Act,

(a) "creditor" means

(i) in relation to a writ of execution, any person entitled to enforce by execution the payment of any money payable pursuant to any judgment or order that is enforceable by execution, and

(ii) in relation to a distress, the person who has the power of distress;

(b) "Court" means the Court of Queen's Bench;

(c) "debtor" means

(i) in relation to a writ of execution, any person liable for the payment of any money under a writ of execution, and

(ii) in relation to a distress, the person who is liable for the payment of any money or the delivery up of any goods or chattels, which payment or delivery up is enforceable by distress or by proceedings in the nature of distress;

(d) "distress" means any and all acts or things done in the exercise of a power of distress;

(d.1) "goods" means tangible personal property other than chattel paper, a document of title, an instrument, a security and money, and includes fixtures, growing crops and the unborn young of animals, but does not include timber until it is cut or minerals until they are extracted;

(e) "judgment creditor" means the person entitled to receive any money payable under any judgment or order of the Court;

(f) "judgment debtor" means the person liable for the payment of any money payable under any judgment or order of the Court;

(g) "power of distress" means the right that a person has to enforce the payment of any claim against, or the taking of any goods or chattels out of the possession of, another person by the taking of a personal chattel out of the possession of that last
mentioned person otherwise than by the authority of a writ of execution or other process of a similar nature;

(g.1) "proceeds" means identifiable or traceable personal property, including fixtures and crops,

(i) derived directly or indirectly from any dealing with collateral or the proceeds of the collateral, and

(ii) in which the debtor acquires an interest, and, in the case of goods, of which the debtor obtains possession,

and includes

(iii) a right to an insurance payment or any other payment as indemnity or compensation for loss of or damage to the collateral or proceeds of the collateral, and

(iv) a payment made in total or partial discharge or redemption of an intangible, chattel paper, an instrument or a security;

(g.2) "purchase-money security interest" means

(i) a security interest taken or reserved in collateral to secure payment of all or part of the purchase price, or

(ii) a security interest taken by a person who gives value for the purpose of enabling the debtor to acquire rights in or to collateral, to the extent the value is applied to acquire such rights,

and for the purposes of this definition "purchase price" and "value" include credit charges and interest payable in respect of the purchase or loan;

(g.3) "registered" means, in connection with a security interest or a writ of execution, registered in the Personal Property Registry in accordance with the *Personal Property Security Act* and the regulations made under that Act;

(g.4) "secured party" means a party who has a security interest in goods;

(g.5) "security agreement" means an agreement that creates or provides for a security interest;

(g.6) "security interest" means an interest in goods that secures payment or performance of an obligation;

(h) "sheriff" includes assistant sheriff and sheriff's bailiff;

(i) "writ of execution" includes a writ of attachment.

Application of Act

Non-application of Act

2 This Act does not apply

(a) to a security agreement to which the *Personal Property Security Act* applies except as provided by this Act or the *Personal Property Security Act*,

(b) to a power of distress for the recovery or enforcement of payment of taxes, nor to any distress thereunder, or

(c) subject to section 3, to a power of distress to enforce the payment of money payable under a conviction or order of a justice of the peace or a provincial judge by the authority of an Act or by virtue of a by-law having the force of law in Alberta, nor to any distress thereunder.

Masters and Servants Act

3 This Act applies to a power of distress to enforce the payment of money payable under an order made pursuant to the *Masters and Servants Act*.

Exigibility of Property

Binding effect of writ of execution

4(1) A writ of execution, from delivery of it for execution to a sheriff, binds the goods of the judgment debtor situated within the judicial district of that sheriff, but neither the binding effect of the writ nor seizure of the goods by a sheriff pursuant to the writ shall prejudice

(a) an interest in the goods acquired by any person in good faith for valuable consideration, unless that person had, at the time when he acquired his interest, notice that the writ had been delivered to the sheriff and remained in his hands unsatisfied, or unless the writ was registered before such interest was acquired;

(b) subject to sections 20(1)(a) and 35(5) of the *Personal Property Security Act*, the interest of a secured party unless the writ is registered before such interest is perfected pursuant to the *Personal Property Security Act*;

(c) subject to sections 20(1)(a) and 35(5) of the *Personal Property Security Act*, the interest of a secured party who has taken a purchase-money security interest in the goods that is perfected after registration of the writ but not later than 15 days after

(i) the debtor obtains possession of the goods, or

(ii) a third party, at the request of the debtor, obtains possession of the goods

whichever is the earlier.

(2) Nothing in subsection (1)(a) affects an interest in goods acquired in good faith for valuable consideration by any person under a transaction which was in the ordinary course of business of the execution debtor, whether or not the writ of execution was registered or the person had notice that the writ had been delivered to the sheriff and remained in his hands unsatisfied.

(3) Nothing in subsection (1) affects an interest in goods acquired as consumer goods by a buyer or lessee who

(a) gave new value as defined in the *Personal Property Security Act* for the interest acquired, and

(b) bought or leased the goods without knowledge that the writ had been delivered to the sheriff and remained unsatisfied and without knowledge of the registration of the writ.

(4) Subsection (3) does not apply to an interest acquired in

(a) a fixture, or

(b) goods the purchase price of which exceeds $1000 or, in the case of a lease, the market value of which exceeds $1000.

Equitable rights, etc.

5(1) By virtue of a writ of execution the sheriff charged with the execution thereof may seize and sell any equitable or other right, property, estate or interest of the debtor in or in respect of any goods or other personal property and any equity of redemption of the debtor therein, and also any leasehold interest in land and any other chattels real that are the property of the debtor.

(2) On the sheriff making a sale of any such property, whatever equitable or other right, property, interest or equity of redemption the debtor had or was entitled to in or in respect of the goods or other personal property so sold at the time of the seizure thereof under the writ of execution, vests in the purchaser.

Seizure of money and securities

6(1) By virtue of a writ of execution a sheriff may seize money or bank notes belonging to the debtor including

(a) any surplus of a former execution against the debtor, and

(b) any money levied under a writ of execution issued on a judgment or order in the debtor's favour,

as well as any cheques, bills of exchange, promissory notes, bonds, mortgages or other securities for money belonging to the person against whom the execution has been issued.

(2) The sheriff may hold the cheques, bills of exchange, promissory notes, bonds or other securities for money as security for the amount directed to be levied or so much thereof as has not been otherwise levied or raised, and

(a) subject to the *Execution Creditors Act*, may pay and assign those securities to the creditor at the sum actually due on and secured by them respectively if the creditor will accept them as money collected, and the assignment on notice to the debtor vests in the creditor all the rights that are capable of assignment in respect of the securities, or

(b) may sue in his own name for the recovery of the sums secured thereby and for the enforcement of the security.

(3) The transfer by the sheriff to the creditor of any of the property mentioned in this section discharges the sheriff to the extent of the amount due on and secured thereby.

(4) Payment to the sheriff by the person liable under any of the securities mentioned in this section and seized in execution by the sheriff discharges the person so liable from his liability in respect thereof to the extent of the payment.

(5) Subject to the *Execution Creditors Act*, any money realized by the sheriff under a writ of execution in respect of any of the property mentioned in this section, subject to the payment of the proper costs, charges, expenses, fees and poundages of the sheriff, is payable to the person entitled thereto under the *Execution Creditors Act* to the extent to which they are so entitled, and any surplus that then remains shall be paid to the debtor or other person lawfully entitled to receive it.

Seizure of shares and dividends

7(1) Shares and dividends, and any equitable or other right, property or interest or equity of redemption in or in respect of shares or dividends, in a bank or an incorporated company having transferable shares shall be deemed to be personal property found in the place where notice of the seizure thereof is served, and may be seized under execution and may be sold thereunder in like manner as other personal property.

(2) The sheriff, on being informed by or on behalf of the judgment creditor that the debtor has any shares referred to in subsection (1) and on being required to seize them, shall

(a) seize the share certificates or other documents evidencing the ownership of the shares, and

(b) either before or within 5 days after the seizure, serve a copy of the writ of execution on the bank or company and a notice that all the shares of the debtor are seized thereunder.

(3) When the notice referred to in subsection (2)(b) is served, no transfer of the shares by the debtor is valid unless the sheriff notifies the bank or company that the seizure has been withdrawn.

(4) Every seizure and sale made under the execution shall include all dividends, premiums, bonuses or other pecuniary profits on the shares seized, and they shall not, after notice has been given in accordance with subsection (2), be paid by the bank or company to anyone except the person to whom the shares have been sold.

(5) The seizure may be made and notice given by the sheriff of the judicial district within which the bank or company has a place at which service of process may be made or where a share register is kept.

(6) If the bank or company has more than one place where service of process may be made, and there is some place where transfers of shares may be effected and entered by the bank or company so as to be valid as regards the bank or company, or where dividends or profits on stock may be paid, other than the place where service of the notice has been made, the notice does not affect any transfer or payment of dividends or profits duly made and entered at any place, other than the place where service of the process was made, so as to subject the bank or company to pay twice, or so as to affect the rights of any bona fide purchaser, until after the expiration of a period from the time of service sufficient for the transmission of notice of service by post from the place where it has been made to that other place, which notice the bank or company shall transmit.

(7) When any share is sold the sheriff shall within 10 days after sale serve on the bank or company at some place where service of process may be made a copy of the execution with his certificate endorsed thereon, certifying the sale and the name of the purchaser.

(8) The purchaser has the same rights and is under the same obligations as if he had purchased the share from the debtor at the time of the service of notice under subsection (2).

(9) Nothing in this Act affects any remedy that the creditor might, without this Act, have had against any share or the dividends, premiums, bonuses or other pecuniary profits in respect thereof, and subsections (2) to (8) apply to that remedy in so far as they can be applied thereto.

(10) If a sheriff seizes the shares of a debtor in a company, and the company's incorporating documents restrict or prohibit the right to transfer those shares, he

shall first offer them for sale to the other shareholders, or any one of them, in the company, and shall send by mail to the company at its registered office and to at least 3 other shareholders of the company if there are so many, and, if not, to the other shareholders, notice of the seizure, and shall sell the shares seized or any part of them to any shareholder who within 30 days of the date of the mailing of the notice

(a) makes an offer for the purchase thereof at a price that appears to the sheriff to be reasonable, and

(b) pays the purchase price to the sheriff.

(11) Any shares referred to in subsection (10) that remain unsold at the expiration of the period of 30 days shall be sold by the sheriff in the same manner as any other personal property.

Seizure of mortgage

8(1) A sheriff charged with the execution of a writ of execution may seize thereunder any registered mortgage of or encumbrance on or security interest in land or chattels of which the debtor is the owner, by delivering a notice in writing of the seizure to the proper officer in the office in which the mortgage or encumbrance is registered.

(2) No mortgage, encumbrance or security interest is affected or charged by a writ of execution until delivery of the notice.

(3) On receipt of the notice and any applicable fees, the proper officer shall make an entry of it in the register or other record in which the mortgage, encumbrance or security interest is registered.

(4) No person who is liable to pay money under a mortgage, encumbrance or security interest seized pursuant to this section is affected by the seizure until

(a) notice in writing of the seizure has been served on him personally, or

(b) he has otherwise acquired actual knowledge of the seizure.

(5) Any payments made by that person to the debtor after service of the notice of the seizure or after acquiring actual knowledge of the seizure are of no effect as against the sheriff and the creditor.

Order of sale

9 No mortgage or other security for money seized under a writ of execution shall be sold except on the order of the Court and then only on any conditions the Court thinks fit to prescribe.

Seizure of growing crop

10 The sheriff by a writ of execution may seize any of the goods and chattels of the debtor including any growing crop of grain or roots or any interest of the debtor therein.

Seizure of growing crops

11 When a sheriff seizes under a writ of execution any growing grain crop or any growing root crop, he may seize all the growing grain crops and all the growing root crops of the execution debtor within his district regardless of the amount of the execution debt.

Notice of seizure of growing crops

12(1) After compliance with section 25, any growing crop shall be deemed to have been seized by the sheriff on the sheriff posting up a notice on any parcel of land on which the crop seized or any part thereof is growing that the growing crop has been seized, and thereupon and thereafter all crops so seized shall be deemed to be continuously under seizure by the sheriff while growing and during and after harvesting until the money levied thereon has been paid and satisfied, unless the sheriff by writing sooner abandons the seizure.

(2) The sheriff is under no obligation to release the crop from seizure until he has been paid out of the proceeds of the crop or otherwise all money payable in respect of the seizure.

Security for harvesting expenses

13(1) Unless, on the seizure of a growing crop of grain or roots, the debtor undertakes on behalf of and as agent for the sheriff to perform the things necessary for the harvesting and gathering in of the growing crop, the sheriff may require the creditor to furnish him, on or before a day to be specified by him, with security to the satisfaction of the sheriff for the due payment of any costs, charges and expenses that might be incurred by him in the harvesting and gathering in of the crop.

(2) If the creditor defaults in furnishing the sheriff with the security, the sheriff may release the crop from seizure.

(3) Any expenses incurred by the sheriff in relation to a growing crop are a first charge on and payable out of the proceeds of the crop in priority to all other claims and demands.

(4) If

(a) more than one person is entitled to the proceeds of the growing crop and their claims are pari passu, then the expenses shall be apportioned pro rata amongst all the persons entitled to the proceeds in proportion to their respective shares, or

(b) more than one person is entitled to the proceeds of the growing crop and any of those persons is entitled to receive payment in priority to any other person, the expenses

(i) shall be charged against the proceeds of the crop payable to the person or persons whose claim is inferior, and

(ii) shall only be charged against the proceeds payable to any person or persons whose claim is superior to the extent that the amount payable to any person or persons having the inferior claim is insufficient to defray the expenses in full.

(5) No sale under writ of execution shall be made by a sheriff of any grain or roots that are growing or that have not been harvested.

(6) When grain, roots or livestock are in condition for marketing and are ordinarily disposed of in the open market at the price for the time being prevailing in that market, the sheriff may sell the grain, roots or livestock in any available open market at the prevailing market price.

(7) If any grain or roots are subject to a contract requiring the marketing thereof through a co-operative marketing association and the sheriff has notice of the contract, he shall market the grain or roots in accordance with the contract.

(8) If any livestock are subject to a contract requiring the marketing thereof through a co-operative marketing association, the sheriff may, if in his discretion he considers it advisable to do so, market the livestock in accordance with the contract.

(9) If any grain, roots or livestock are subject to a contract for the delivery thereof when made ready for a market at a price that in the opinion of the sheriff is a reasonable price, the sheriff may deliver the goods in accordance with the contract on the payment to him of the contract price.

Sale

Sale of personal property

14(1) Personal property taken in execution under any writ of execution or by virtue of any power of distress and not specifically mentioned in this Act shall, unless the Court otherwise orders, be offered for sale by public auction or by tender.

(2) Notice of the public auction or sale by tender shall be sent by registered mail to the creditor and debtor at their respective last known post office addresses at least 10 days prior to the public auction or sale by tender.

(3) A public notice describing the property to be sold and stating the day, time and place of the public auction or sale by tender

(a) shall be posted for a period of at least 10 days prior to the auction or sale in the office of the sheriff and, if the sheriff so directs, in any other places in the locality of the place where the auction or sale is to be held, and

(b) if the sheriff so directs and in accordance with his directions, shall be advertised by publication in a newspaper circulating in the locality of the place where the auction or sale is to be held.

Sale of land

15(1) No sale of land shall, unless the Court otherwise orders, be had under a writ of execution

(a) until after a return nulla bona in whole or in part, and

(b) until after the expiration of one year from the date of the receipt by the Registrar of the appropriate land titles office of the copy of the writ of execution.

(2) No land shall be sold under a writ of execution until after the giving of such notice of the sale by advertising or otherwise as may be directed by the Court.

(3) When at a sale by auction held by a sheriff of land taken in execution

(a) there are no bidders, or

(b) the sheriff receives for the land no bid that he considers sufficient,

the sheriff may from time to time adjourn the sale to a date to be subsequently fixed by the sheriff and either to the same or a different place and, in any other case, notice of the adjourned sale shall be given in the manner prescribed by section 14.

(4) If the amount authorized to be made and levied under a writ of execution is made and levied thereunder out of goods and chattels, the person issuing the writ is not entitled to the expenses of any advertising of land thereunder.

Sheriff's Agent and Inventory

Appointment of agent by sheriff

16 The sheriff, at any time after making a seizure of goods under a writ of execution or by virtue of a power of distress, may appoint the debtor or some other person as his agent to hold and keep the goods so seized for and on behalf of the sheriff, on the debtor or other person signing an undertaking to hold the goods as bailee for the sheriff and to deliver up the possession thereof to the sheriff on demand.

Delivery of inventory to owner

17 When any goods or chattels are seized the sheriff shall on request deliver to any person who is the owner thereof or who is at the time of seizure in possession thereof, or to the agent or servant of any such person, an inventory of the goods seized before they are removed from the premises on which they have been so seized.

Distress

Persons authorized to make distress

18 Unless it is otherwise ordered by the Court, no distress shall be made, taken, levied, executed or carried into effect except only

(a) by a sheriff, assistant sheriff, deputy sheriff, sheriff's bailiff or some other person authorized in writing to do so by a sheriff, assistant sheriff or deputy sheriff, and

(b) between the hours of 5 a.m. and 8 p.m. in the case of a distress for rent.

Distress for rent

19(1) A landlord shall not distrain for rent on goods and chattels that are the property of any person except the tenant or person who is liable for the rent, although the goods and chattels are found on the premises.

(2) Subsection (1) does not apply

(a) in favour of a person claiming title under or by virtue of an execution against the tenant,

(b) subject to clause (b.1), in favour of a person whose title is derived by purchase, gift, transfer or assignment, or otherwise, from the tenant, whether absolute or in trust,

(b.1) in favour of a person who has a security interest in goods on the premises other than a person who has a purchase-money security interest in the goods as original collateral or as proceeds,

(c) if goods have been exchanged between 2 tenants or persons by the one borrowing or hiring from the other for the purpose of defeating the claim of or the right of distress by the landlord, or

(d) when the property is claimed by the wife, husband, daughter, son, daughter-in-law or son-in-law of the tenant or by any other relative of his if the other relative lives on the premises as a member of the tenant's family.

Distress for interest on mortgage

20 The right of a mortgagee of land or his assigns to distrain for interest in arrears or principal due on a mortgage is, notwithstanding anything stated to the contrary in the mortgage or in any agreement relating to the mortgage, limited

(a) to the goods and chattels of the mortgagor or his assigns, and

(b) to only those goods and chattels that are not exempt from seizure under execution.

Claim to goods under distress

21(1) If, on the levying or making of a distress or seizure under a distress, a claim in writing is made to or in respect of the property seized or any part thereof, the sheriff shall proceed as if

(a) the claim were made to or in respect of goods taken in execution under process of the Court, and

(b) the person directing the distraint or seizure were an execution creditor.

(2) The rules of court applicable to interpleader by a sheriff apply to procedure by the sheriff under this section.

(3) The right of the sheriff to interpleader relief under the rules of court is not affected by the fact that the sheriff has been furnished with any security that he is permitted to require pursuant to this Act.

Distress warrant

22(1) No distress shall be made and no levy shall be made under a distress unless the person entitled to cause the distress and levy to be made or his authorized agent has executed and delivered a proper warrant in that behalf to some person authorized by this Act to make and levy a distress.

(2) No person to whom a distress warrant is delivered for execution is bound to proceed thereon unless he has been furnished with security that he considers to be reasonably sufficient from time to time to indemnify him in respect of his fees, charges and expenses, and any claims for damages in respect of the distress and levy, and anything done in relation thereto.

Entry and Notice

Entry into buildings to effect seizure

23 For the purpose of effecting the seizure of any goods and chattels authorized by a writ of execution or a distress warrant, or obtaining the possession of any goods that have previously been seized, the person lawfully charged with the execution thereof may, if it is not possible otherwise to effect the seizure or to

obtain possession of goods previously seized, as the case may be, either by himself or with the assistance of any persons he requests, break open the door or doors of any building other than a private dwelling house in which any goods and chattels liable to seizure are contained, and on the order of the Court may similarly break open the door or doors of a private dwelling house.

Mobile home

24(1) In this section "mobile home" means

(a) a vacation trailer or house trailer, or

(b) a structure, whether ordinarily equipped with wheels or not, that is constructed or manufactured to be moved from one point to another by being towed or carried and to provide living accommodation for one or more persons.

(2) When a mobile home is seized under a writ of execution or a distress warrant, if

(a) the mobile home is occupied by the debtor or some other person, and

(b) the occupant fails, on demand, to deliver up possession of the mobile home,

the creditor, on notice of motion to the occupant, may apply to the Court which may make an order directing the occupant to deliver up possession of the mobile home.

(3) The order shall provide

(a) that if the occupant fails to deliver up possession of the mobile home within the time specified in the order, the sheriff shall eject and remove the occupant together with all goods and chattels he may have in the mobile home, and

(b) that if it is not possible otherwise to obtain possession the person charged with the execution of the order, either by himself or with the assistance of any persons that he requests, may break open the door of the mobile home.

(4) On there being filed with the sheriff an affidavit

(a) showing service of the order on the occupant, and

(b) stating that the occupant has failed to deliver up possession of the mobile home as requested by the order, the sheriff or his bailiff shall, with any assistance he may require, forthwith proceed to obtain possession of the mobile home as authorized by the order.

Effecting seizure

25(1) To effect the seizure of any goods or chattels under any writ of execution or under any distress, the person authorized to effect the seizure

(a) shall serve on the debtor, and if there is more than one debtor, on each one of them, or on some adult member of his household,

(b) shall attach to the goods to be seized or some or all of them, or

(c) shall post up in some conspicuous place on the premises on which the goods or some part of them are at the time of seizure

a notice of seizure in the prescribed form and a notice of objection to seizure in the prescribed form.

(2) A seizure made pursuant to this Act shall be deemed to be a continuing seizure

(a) until the time the sheriff by notice in writing releases the seizure, or

(b) until the goods or property under seizure have been sold.

(3) If, in the opinion of the person authorized to effect the seizure, any particular goods or chattels are not readily distinguishable and identifiable from other similar goods or chattels, the person so authorized may affix to the goods or chattels a sticker in the prescribed form.

(4) The sticker shall

(a) briefly describe the article to which it is attached, and

(b) be signed by the sheriff or other person authorized to effect the seizure.

(5) Any person who

(a) removes, transfers, defaces or otherwise interferes with a sticker affixed to an article pursuant to this section, or

(b) removes or in any way interferes with an article to which a sticker has been affixed pursuant to this section,

is guilty of an offence and is liable to a fine of not more than $200 and in default of payment to imprisonment for not more than 60 days, or to both fine and imprisonment.

Procedure Relating to Sale

Procedure re sale

26(1) The notice of seizure shall bear a heading in red letters and larger type than the body of the document, as follows: "NOTICE OF SEIZURE OF GOODS", and the names of the debtor and creditor shall be inserted therein before the seizure is made.

(2) The notice of objection to seizure shall be accompanied by a sufficiently stamped envelope addressed to the sheriff of the judicial district in which the goods are situated.

(3) The respective names and addresses of the creditor and debtor must be inserted in the notice of objection before the seizure is made.

Notice of objection

27(1) The person liable for the payment of the debt for which the seizure is made, if he objects to the removal and sale of the goods seized, shall sign the notice of objection and within 14 days of the date of the seizure cause it to be delivered to the sheriff.

(2) The absence of the signature or the post office address of the debtor does not invalidate the notice of objection if it be duly made.

Disposal of seized goods

28 If no notice of objection is received by the sheriff within 14 days after the seizure of the goods, the goods seized may be disposed of according to law.

Application for order to remove and sell

29(1) When the sheriff receives a notice of objection he shall immediately notify the creditor and thereupon the creditor may from time to time apply by notice of motion to the Court for an order for the removal and sale or for the removal or the sale of the property seized or any part of it.

(2) When a creditor applies pursuant to subsection (1), the notice of motion shall, as far as is reasonably possible, specify and describe the particular property in respect of which the order is sought.

(3) Seven days' notice of the application shall be given to the debtor, or such other notice as the Court may direct.

(4) Every application shall be dealt with in a summary manner and may be adjourned from time to time.

(5) On the hearing of the application the evidence may be taken either orally or by affidavit as the Court directs and the Court

(a) may in its discretion either refuse the application, or make an order for the removal or sale of the goods or both,

(b) repealed 1988 cP-4.05 s97,

(c) may make the order on any terms and conditions as to costs or otherwise it determines,

(d) may by the same order, or on the application of the debtor by a subsequent order, suspend the operation of the order pending the payment of the debt by such instalments as the Court may fix, or the giving of such security or the performance of such other conditions as the Court may impose, and

(e) may order the release of all or any part of the goods seized.

(6) When the Court orders a sale, it may give directions as to the manner, time and place of the sale and any other directions that to it seem proper and convenient and may give leave to any party to bid or submit a tender, as the case may be, at the sale.

(7) An order made under this section shall as far as is reasonably possible specify and describe the particular property in respect of which the order is made.

(8) If on the hearing of an application under this section it appears that there is a dispute as to

(a) the right to make the seizure,

(b) the amount payable in respect of the seizure, or

(c) the ownership of the goods seized,

the Court in its discretion may hear and determine the dispute in a summary manner on the notice and to the persons that it may direct and on either oral or affidavit evidence or both, as the Court considers appropriate.

(9) There is no appeal from an order of the Court except only when the indebtedness in question exceeds the sum of $500, and in that case an appeal lies to the Court of Appeal.

When no notice of objection received

30(1) If no notice of objection is received by the sheriff within 14 days after the seizure of goods,

(a) the sheriff may on the instructions of the creditor proceed to sell the goods seized in the manner prescribed by this Act,

(b) if he is entitled to do so, the creditor may sell the goods seized or cause them to be sold by some person other than the sheriff, either by public auction, sale by tender or private sale, on giving to the debtor 5 days' notice in writing of his intention to exercise his rights to do so, or

(c) on the application in writing to the sheriff by the debtor stating that in his opinion the value of the goods seized is greater than the amount of the creditor's claim and costs, the sheriff, if he is satisfied that it is proper in the circumstances to do so, may direct that the goods seized be sold only subject to his approval and in that event no sale of the goods shall be made by the creditor until the approval of the sheriff has been obtained and the proceeds of the sale shall be paid to the sheriff to be dealt with by him according to law.

(2) When goods under seizure are delivered into the possession of a creditor for the purposes of sale pursuant to subsection (1)(b), the sheriff is relieved of all further responsibility in respect of those goods.

(3) When the creditor makes or effects the sale under subsection (1)(b), the creditor

(a) shall within 30 days after the sale file with the sheriff of the judicial district in which the seizure was made a statutory declaration setting out

(i) the particulars of the sale,

(ii) the amount realized by the sale, and

(iii) the necessary and proper disbursements and fees in connection with the sale, which shall not exceed those that a sheriff would have been entitled to charge if the sale had been effected by the sheriff,

and

(b) shall immediately after the sale, if the proceeds of the sale exceed the amount for which the seizure was made together with the disbursements or if that amount with disbursements is realized by the sale of a part only of the goods seized, deliver the excess and any goods unsold to the sheriff to be delivered by him to the persons lawfully entitled thereto.

Disposal of seized goods by sheriff

31(1) Notwithstanding anything in this Act, a sheriff

(a) who has lawfully seized goods under a writ of execution or under a power of distress, and

(b) who believes that it is necessary or advisable that the goods be taken by him and removed, may, in his discretion, make any removal and disposition of the goods that he considers necessary without any order.

(2) If any of the goods lawfully seized are of a perishable nature the sheriff may, in his discretion, sell the goods in any manner he considers proper without any order and the proceeds of the sale shall take the place of and be dealt with as if the proceeds were the goods so sold.

Adjournment of sale

32(1) If property taken in execution or under a power of distress is offered for sale by auction or tender and

(a) there are no bids or tenders made for the property or any part of it, or

(b) the bids or tenders made are, in the opinion of the sheriff, inadequate, having regard to the value of the property taken in execution or under the power of distress and offered for sale,

the sheriff may adjourn the sale.

(2) If the adjournment of the sale is for a period of more than 7 days or to a different place, the sheriff shall give 5 days' notice of the adjourned sale in the same manner as is provided by section 14, or if the sale has been adjourned sine die, the sheriff shall give notice of any adjourned sale in the manner prescribed by section 14.

Sale by private contract

33 If goods taken in execution or under a power of distress have been offered for sale and remain unsold, the sheriff may, without a writ of venditioni exponas, sell the goods by private contract to the creditor or to any other person if the price offered for the property is, in the opinion of the sheriff, a fair and reasonable price having regard to all the circumstances.

Application for order to restrain proceedings by creditor

34(1) The debtor or any person claiming an interest in the goods or chattels under seizure may, at any time after the seizure of any chattels under distress or under a writ of execution and before they have been sold, apply to the Court, on 4 days' notice to the creditor or such other notice to the creditor as the Court may direct, for an order restraining the creditor from proceeding to remove or sell or remove and sell all or any of the chattels seized.

(2) The Court may refuse the application, or when it is satisfied that it is proper and convenient in the circumstances to do so, it may grant the application in whole or in part and subject to any condition it considers proper, and on making any such order may order the seizure to be released, and may make any order as to the disposition of the goods seized that it considers proper in the circumstances.

Costs against debtor

35 If a creditor claims under a bill of sale, chattel mortgage or lien note or for rent proceeds concurrently by way of distress and by way of action for the recovery of the indebtedness, no costs or other disbursements shall be allowed in the action against the debtor except on the order of the Court and on such notice as the Court may direct.

Sale of goods without warranty of title

36 On the sale by the sheriff of goods pursuant to a writ of execution or a distress, the sale shall be without warranty of title and the purchaser, on paying the purchase price, thereby acquires the precise interest and no more in the goods that are so sold and that are lawfully sold under execution or distress, as the case may be.

Service of notices by mail

37(1) Any notice required to be served on any person pursuant to this Act may, unless this Act contains express provisions to the contrary, be served by sending it by registered mail in a prepaid cover addressed to that person at his latest known post office address.

(2) The notice shall be deemed to have been served on proof being made by affidavit stating

(a) that the notice was sent by registered mail in a prepaid envelope addressed to the person to be served at his latest known post office address,

(b) the date and place of mailing of the registered letter, and

(c) the date at which the registered letter would, in the ordinary course of mail, reach its destination.

(3) The date at which the registered letter would, in the ordinary course of mail, reach its destination shall be deemed to be the date of service of the notice.

Bond of Indemnity

Seizure of property not in possession of debtor

38(1) A sheriff is not under any duty to seize any property that is in the possession of a person, other than the debtor, who claims any interest therein or right thereto unless the creditor

(a) delivers to him in writing

(i) instructions to seize the property, and

(ii) such a description of the property to be seized as will enable the sheriff to identify it

and

(b) furnishes the sheriff with a good and sufficient bond of indemnity to the satisfaction of the sheriff.

(2) Any bond taken by the sheriff pursuant to this section is assignable to any person, other than the debtor, who claims an interest in the property and shall be on the condition that the persons executing the bond are liable for the damages, costs and expenses

(a) which the sheriff or any person claiming an interest in the property might be put to by reason of the seizure and any subsequent proceedings including interpleader proceedings, if any, and

(b) which are not recovered from any other persons who ought to pay them.

(3) If a difference arises as to the bond to be furnished pursuant to this section the sheriff shall, on the request of the creditor, refer the matter to the Court for determination.

Applications to Judge

Application for directions

39(1) When the sheriff has any doubts as to the exercise by him of any power, duty or authority conferred or imposed on him by this Act, he may on his own motion apply to the Court for directions.

(2) At any time after a distress the creditor or debtor may on his own motion apply to the Court for directions with respect to the exercise or intended exercise by the sheriff of any of the powers, duties or authorities conferred or imposed on the sheriff by this Act.

(3) On an application under subsection (1) or (2), the Court may, on whatever notice and to whatever parties it thinks proper, and after hearing any evidence that it considers necessary, make an order giving any directions consistent with this Act that it considers proper and convenient.

(4) No action or proceeding of any kind lies against the sheriff for anything done pursuant to or in conformity with any directions so given.

Notice of intention to release seizure

40(1) A sheriff in his discretion may, at any time after a seizure under writ of execution or distress warrant has been in effect for 6 months, serve on

(a) the party who instructed the seizure, or

(b) in the case of a seizure under execution, all persons having subsisting writs of execution in his hands,

a notice in writing informing each person so served that on the expiration of a period of 60 days from the date of service of the notice he intends to release the seizure unless before that time application is made to the Court for an order continuing the seizure.

(2) If no application is made pursuant to subsection (1) the sheriff may release the seizure.

(3) An application made pursuant to subsection (1) may be made ex parte or on such notice as the Court may direct, but in every case the applicant shall serve the sheriff with notice thereof.

(4) The Court on hearing the application may make any order providing for the release of or the continuation of the seizure and in either case on any terms including costs it considers proper.

(5) For the purposes of subsection (1) the date of service shall, when service is made by ordinary mail, be deemed to be the date on which the notice would have arrived at the last known address of the person served in the ordinary course of delivery, if the notice is in fact addressed to the last known address of that person and placed in the mail.

Offences and Penalties

Penalty for unauthorized seizure, etc.

41 A person

(a) who in contravention of this Act and under a power of distress, makes a seizure or levies a distress or does any act for the purpose of carrying such a seizure or levy into effect, or

(b) who by means of threats of seizure or sale obtains or takes or receives from a person any goods and chattels or the proceeds thereof when that first mentioned person is not there and then fully authorized to make a seizure or levy a distress in respect of those goods and chattels,

is guilty of an offence and liable, if a corporation, to a fine of not more than $200, and if any other person, in the case of a first offence to a fine of not more than $200, and in default of payment forthwith to imprisonment for a term of not less than one nor more than 6 months, and in the case of a 2nd or subsequent offence to imprisonment without the option of a fine for a term of not less than 3 nor more than 6 months.

Penalty for non-delivery

42(1) A person

(a) who is under a duty to deliver to a sheriff goods or chattels that have been seized by the sheriff, and

(b) who defaults in delivering the goods or chattels to the sheriff within a reasonable time after being required to do so by the sheriff,

is liable to attachment on application to the Court and may be proceeded against as for a civil contempt of the Court.

(2) An application under subsection (1) shall be made on notice of motion by the person on whose behalf the goods or chattels were seized by the sheriff.

Possession of goods

43 When any goods have been removed from a judicial district while under seizure, the sheriff of the judicial district in which they were seized may either

(a) enter any other judicial district and obtain possession of the goods, or

(b) instruct the sheriff of any other judicial district to obtain possession of the goods on his behalf and deliver them to him.

Penalty against creditor selling goods himself

44 A person who contravenes section 30(3) is guilty of an offence and liable

(a) in the case of a corporation, to a fine of not more than $200, and

(b) in the case of any other person, to a fine of not more than $200 and in default of payment thereof to imprisonment for a term of not less than 2 months nor more than 6 months.

Miscellaneous

Temporary seizure of exempted goods

45 Notwithstanding anything in the *Exemptions Act*, if a seizure under a writ of execution is made of any goods or chattels of such a nature or under such circumstances that the sheriff in his sole discretion considers it impracticable to except from the goods and chattels seized those goods and chattels that are exempt from seizure under the *Exemptions Act*, the sheriff may seize the goods and hold them under seizure until he can conveniently ascertain the goods and chattels exempt from seizure, and thereupon he shall release them to the debtor.

Application of Execution Creditors Act

46(1) The *Execution Creditors Act* is not applicable to the proceeds of sale of any property seized and sold otherwise than under a writ of execution.

(2) Notwithstanding subsection (1), when a chattel has been seized and sold in the exercise of a power of distress to which this Act applies, any surplus money remaining in the hands of the sheriff after he has

(a) paid in full the claim of the person who exercised the power of distress, and

(b) deducted his fees, charges and expenses and any claims for damages in respect of the distress and levy,

shall be deemed to be the proceeds of property seized and sold under a writ of execution and to have been attached on behalf of all creditors who are entitled by the *Execution Creditors Act* to share in any money received by the sheriff by reason of a seizure or attachment.

(3) If the chattel seized and sold in the exercise of a power of distress is one that would otherwise be exempt from seizure under the *Exemptions Act*, subsection (2) does not apply and the surplus money remaining in the hands of the sheriff shall be paid to the person from whom the chattel was seized under the power of distress.

Regulations

47 The Lieutenant Governor in Council may make regulations

(a) as to the procedure to be followed and the forms to be used in any proceeding authorized by this Act;

(b) prescribing the tariff of fees, costs and charges payable to the clerk of the court and the sheriff in relation to any seizure and which may be chargeable against a debtor.

Examination of debtor

48(1) In this section,

(a) "creditor" means the person who has the power of distress under a conditional sale agreement or a chattel mortgage;

(b) "debtor" means the person who under a conditional sale agreement or a chattel mortgage is liable for the payment of any money or the delivery up of any goods or chattels, if the payment of the money or the delivery up of the goods is enforceable by distress or by proceedings in the nature of distress.

(2) At any time after a distress a creditor may, on the order of the Court, examine on oath

(a) the debtor in respect of whom the distress was made, or

(b) any other person or corporation whom the creditor, upon reasonable grounds, believes to be in possession of or to have knowledge respecting the whereabouts of any goods and chattels that comprise the creditor's security under the conditional sale agreement or the chattel mortgage,

before the clerk of the judicial district within which the debtor resides, or before any other person named in the order, as to the whereabouts of the goods and chattels that comprise the creditor's security under the conditional sale agreement or the chattel mortgage.

(3) In an examination under this section Part 28 of the Alberta Rules of Court applies, with all necessary modifications, as if the examination of the debtor under this section were an examination of a judgment debtor under those Rules.

SELECTED RULES OF COURT

342. Any judgment for the payment of money into court may be enforced by any mode by which a judgment for the payment of money to a person may be enforced.

346.(1) Except as otherwise provided, every judgment creditor is entitled immediately to issue one or more writs of *fieri facias* but if the judgment is for payment within a period therein mentioned, the writ shall not be issued until after the expiration of the period.

(2) The court may, at or after the time judgment is given, stay execution or may remove or extend any stay already granted.

347. Every writ of *fieri facias* shall be issued against both the goods and lands of the debtor.

355. As between the original parties to a judgment or order, execution may issue at any time within six years from the date of the judgment or order.

356. Where the six years have elapsed or any change has taken place by death or otherwise in the parties entitled or liable to execution, the party alleging himself to be entitled to execution may apply to the Court for leave to issue execution accordingly or to amend any execution already issued, and the Court may make an order to that effect or may order that any issue or question necessary to determine the rights of the parties be tried in any way in which a question in an action may be tried.

359. Every writ of execution shall bear date of the day on which it is issued.

360.(1) Every writ of execution shall be endorsed with the name and place of abode or office of business of the solicitor issuing it, and if he issues it as agent for another solicitor, the name and place of abode of the other solicitor shall also be endorsed.

(2) Where a solicitor is not employed, the writ shall be endorsed with a memorandum stating that it has been issued by the plaintiff or defendant in person with the name of the city, town or other place, and also the name of the street and number, if any, of the house where he resides.

361.(1) Every writ of execution for the recovery of money shall be endorsed with a direction to the sheriff or other officer or person to whom the writ is directed

(*a*) to levy the money really due and payable and sought to be recovered under the judgment, stating the amount, and *(b)* to levy interest thereon, if sought to be recovered, at the rate provided by law from the time when the judgment was entered.

(2) Where there is an agreement between the parties that a higher rate of interest shall be secured by the judgment, the endorsement may be to levy at the rate so agreed.

362. Every writ of execution for recovery of money shall be in Form F in the Schedule with such variations as circumstances may require.

363. Unless otherwise provided by any statute, and except for the purposes of that statute, every writ of execution remains in force so long as the judgment on which it is issued remains in force.

364. When, for the purpose of any statute, a writ of execution requires to be renewed, the writ or the renewed writ may at any time during which the judgment on which it is issued remains in force, be so renewed by being marked in the margin or at the foot with a memorandum signed by the clerk to the following effect: "Renewed from the ________ day of ______________".

365. The sheriff shall, upon the receipt of a writ of execution or renewal thereof, endorse thereon the year, the month, the day, the hour and minute when it was received.

366. Upon every execution there may be levied in addition to the sum recovered by the judgment, the fees, expenses of execution and interest on the amount recovered.

367. The Sheriff to whom a writ is directed shall keep a record of all returns to the writ and renewals of the writ and shall give a certificate of those returns and renewals when demanded.

368. Upon a return by the sheriff of goods or lands on hand for want of buyers, a writ of *venditioni exponas* may be issued for the sale of the goods or lands and the original writ of execution remains in force for the residue.

372.(1) A judgment creditor may, without order, examine the judgment debtor on oath before a clerk or deputy clerk of any judicial district wherein a writ of execution has been entered touching his estate and effects and

(a) as to the property and means he had when the debt or liability that was the subject of the cause or matter in which judgment has been obtained against him was incurred, or in case of a judgment for costs only, at the time of the commencement of the cause or matter,

(b) as to the property and means he still has of discharging the judgment,

(c) as to the disposal he has made of any property since contracting the debt or incurring the liability, or in the case of a judgment for costs only, since the commencement of the cause or matter, and

(d) as to any and what debts are owing to him.

(2) No further examination shall be had without an order until the expiration of one year from the close of the preceding examination.

(3) On the order of the court, a judgment creditor may examine the employee or former employee of the judgment debtor with respect to any matter about which he could examine the judgment debtor under subrule (1).

373.(1) Where the judgment is against a corporation the judgment creditor may in like manner examine any of the officers of the corporation upon oath touching

(a) any amount unpaid upon the stock or shares held by shareholders of the corporation, and for that purpose may obtain the names and addresses of the shareholders and particulars of the stock or shares held or owned by each and the amount paid thereon,

(b) the name, address or other pertinent information relating to any director or former director of the corporation,

(c) what debts are owing to the corporation,

(d) the estate and effects of the corporation, and

(e) the disposal made by it of any property since contracting the debt or incurring the liability in respect of which the judgment was obtained or, in the case of a judgment for costs only, since the commencement of the cause or matter.

(2) On the order of the court a judgment creditor may examine the employee or former employee of the corporation with respect to any matter about which he could examine an officer of the corporation under subrule (1).

374.(1) The court may order any person to whom, or the officer of any corporation to which the judgment debtor has transferred property or effects which would have been exigible under execution in the hands of the judgment debtor

(a) since the date when the liability or debt, which was the subject of the action, was incurred, or

(b) where the judgment is for costs only, since the commencement of the action

to attend before some person named in the order and submit to be examined under oath.

(2) Upon the examination the person examined may be questioned touching

(a) the property and means of the judgment debtor so transferred,

(b) any disposal of property made by the judgment debtor since the dates referred to in subrule (1), and

(c) any debts owing to the judgment debtor.

375. Where the court is satisfied that there is reasonable ground for supposing that any person or corporation is in possession of any property of the judgment debtor exigible under execution, it may order the person or any officer of the corporation to attend and submit to be examined on oath before some person to be named in the order, touching the property and means of the judgment debtor.

376.(1) A person liable to be examined may be served with an appointment signed by the person before whom the examination is to be held, or a copy thereof, and, where the examination is to take place under an order, also with a copy of the order

(2) Service shall be made at least 48 hours before the time appointed for the examination.

377. Where the judgment debtor or other person liable to be examined does not attend, does not allege a sufficient reason for not attending or, if attending, refuses to disclose his property or his transactions or does not make satisfactory answers respecting them, he may be held in civil contempt.

378. Where an officer of a corporation does not attend and does not show a sufficient excuse for not attending, or, if attending, refuses to disclose any of the matters in respect of which he may be examined, he may be held in civil contempt.

379. Where a difficulty arises in or about the execution or enforcement of a judgment, the judgment creditor may apply to the court who may make an order thereon for the attendance and examination of any party or person.

380. The costs of any examination in aid of execution are in the discretion of the court.

381. The filing with the sheriff of a certificate of the amount of any costs of or subsequent to judgment payment by the execution debtor to the execution creditor is upon a direction so to do being endorsed upon the original writ of execution, a sufficient authority to the sheriff to levy those costs and interest thereon under the writ.

382. The rules relating to examination for discovery apply *mutatis mutandis* to all examinations authorized by this Part.

383.(1) Where a judgment creditor alleges that he has a right of relief under either *The Fraudulent Preferences Act* or under the Statute 13 Eliz., Chapter 5, it is not necessary to commence an action to set aside the conveyance with respect to which relief is sought, but the Court may, on motion in the judgment creditor's action served upon the judgment debtor and upon the persons to whom it is alleged the property was conveyed, order the property or part of the property to be sold to realize the amount to be levied under execution.

(2) Where a judgment debtor has an interest in land which cannot be sold under legal process, but can be rendered available by proceedings for equitable execution by sale for satisfaction of the judgment, the Court may, upon motion served upon such persons as may be directed, order the land or the interest therein or a part thereof sold to realize the amount to be levied under execution.

(3) Upon the return of a motion under this Rule the court may

(a) determine the matter summarily, or

(b) direct the trial of an issue to determine any question or questions.

(4) Pending the hearing of the motion or trial of the issue the Court may grant an interim injunction to prevent the transfer or disposition of the property or interest therein or may appoint an interim receiver of the property or interest therein.

465.(1) If a debtor advertises a sale of his goods by auction, a creditor either before or after judgment may apply for a receiver and the court, if satisfied the creditor's claim is likely to be defeated, delayed or hindered, may appoint the sheriff or deputy sheriff receiver of the proceeds of the sale of such of the goods as are not exempt from seizure.

(2) The order may provide that a sum sufficient to satisfy the plaintiff's claim and costs and any outstanding executions against the debtor be held by the receiver to satisfy the executions and any judgment the creditor may recover.

470.(1) In any action for a debt or liquidated demand, upon affidavit by the plaintiff, his solicitor or agent

(a) swearing positively to the facts establishing his cause of action,

(b) stating his belief that the plaintiff is entitled to the relief claimed,

(c) exhibiting an undertaking of the plaintiff that if monies are paid into court under a garnishee summons issued pursuant to leave granted upon this application, he will proceed with the action without delay, and

(d) establishing a reasonable possibility that the plaintiff will be unable to collect all or part of his claim or be subjected to unreasonable delay in the collection thereof unless permitted to issue a garnishee summons,

the court may, upon ex parte application, grant leave to the plaintiff to issue a garnishee summons before judgment.

(2) Any person who has obtained a judgment or order for the payment of money may, without leave, issue a garnishee summons.

(3) A garnishee summons shall be in Form K or L in Schedule A, and shall not be issued until an affidavit of the plaintiff or judgment creditor, his solicitor or agent is filed

(a) showing the nature and amount of the claim or judgment against the defendant or judgment debtor and swearing positively to the indebtedness of the defendant or judgment debtor to the plaintiff or judgment creditor,

(b) stating to the best of the deponent's information and belief that the proposed garnishee (naming him) is indebted to the defendant or judgment debtor, or that monies are accruing due from the proposed garnishee to the defendant or judgment debtor, and that the proposed garnishee is within Alberta,

(c) stating, when the garnishee has more than one office or place of business, the place at which or office through which the indebtedness is alleged to be payable,

(d) stating whether the alleged debt sought to be attached is for wages or salary, the residence of the defendant or judgment debtor and the nature of his occupation in the service of the garnishee at the time the alleged debt was incurred and whether or not the debt sued for or in respect of which the judgment was recovered, was contracted for board and lodging or either of them,

but if the deponent is unable to give all the particulars required by subclauses (c) and (d), it is sufficient if he gives the particulars that are within his knowledge and states that after reasonable inquiry he has been unable to ascertain the other particulars.

(4) The clerk shall endorse on the summons the particulars required to be stated in the affidavit by subclauses (c) and (d) of subrule (3).

(5) No garnishee summons shall be set aside for irregularity unless in the opinion of the court, there has been a substantial non-compliance with these Rules.

471.(1) Service of the summons on the garnishee binds the debt, due or accruing due from the garnishee to the defendant or judgment debtor, the particulars of which are given in the affidavit required by the Rule 470, or so much thereof as is necessary to satisfy the claim of the plaintiff or judgment creditor and the probable costs claimed up to and including the issuance of the garnishee summons; and in the case of doubt the costs shall be fixed by the court.

(2) The Rules relating to service of a statement of claim apply to service of a garnishee summons.

(3) A copy of the garnishee summons shall be served on the defendant or judgment debtor or his solicitor not later than 20 days after payment into court.

(4) If the garnishee has more than one office and it appears from the affidavit filed that money alleged to be due to the defendant or judgment debtor is or may be payable through some other office of the garnishee than that at which the garnishee summons is served, the person in charge of the office at which the garnishee summons is served shall forthwith notify the person in charge of the office at which money alleged to be due to the defendant is or may be payable and that money shall be deemed to have been attached and the garnishee summons is deemed to be served as of the time the notice of the garnishee summons is actually received at the office through which that money is payable or within 48 hours after the actual service of the garnishee summons, whichever is the shorter period.

472. For the purpose of garnishment, wages or salary are deemed to accue due from day to day; but no employer shall be compelled to pay wages or salary or any part thereof otherwise than in accordance with the terms of the hiring.

473.(1) Debts owing from a firm carrying on business within the jurisdiction may be attached, although one or more members of the firm is resident out of the jurisdiction, if the garnishee summons is served within the jurisdiction upon any person having the control or management of the partnership or any member of the firm.

(2) An answer disputing liability in the name of the firm is sufficient.

474. A debt is deemed to be due to the defendant or judgment debtor within the meaning of Rule 471 though it has been assigned, charged or encumbered by the defendant or judgment debtor, if the assignment, charge or encumbrance is fraudulent as against the plaintiff or judgment creditor, as the case may be.

475.(1) Within 10 days after service upon him of the garnishee summons, the garnishee shall either:

(a) pay into court the lesser of

(i) the money due from him to the judgment debtor, or

(ii) an amount sufficient to satisfy the claim or judgment and the probable costs of the plaintiff or judgment creditor, or

(b) file answer, in duplicate in the office of the clerk, disputing his liability to the defendant or judgment debtor or claiming the debt is or may not be attachable, or

(c) file answer, in duplicate, in the office of the clerk stating that the money is accruing due but is not yet payable and that it is to be payable at a specified future date or upon the happening of a specified event, or

(d) file answer, in duplicate, in the office of the clerk stating that the debt attached belongs or may belong to some third person whose name and address so far as known to the garnishee shall be stated.

(2) When the garnishee files answer under clause (c) of subrule (1) then upon the specified future date or upon the happening of the specified future event the garnishee shall pay into court the money accrued due at the time of service of the garnishee summons from him to the defendant or judgment debtor or an amount sufficient to satisfy the claim or judgment and the probable costs of the plaintiff or judgment creditor, whichever is the lesser.

(3) When the garnishee files answer under clause (d) of subrule (1) then unless the court otherwise orders the garnishee shall pay into court with the answer the debt attached or so much thereof as is required to satisfy the claim or judgment and the probable costs of the plaintiff or judgment creditor, whichever is the lesser.

(4) If the garnishee does not pay into court or file answer the court may, on notice to the garnishee after judgment has been entered against the defendant, order that judgment be entered against the garnishee in such amount as may be proper.

476.(1) A garnishee disputing liability to the defendant or judgment debtor shall state the grounds upon which liability is disputed or the grounds upon which the debt is or may not be attachable.

(2) A garnishee who answers that the debt attached belongs or may belong to some third person whall state the circumstances and grounds so far as they lie within his knowledge.

477. A garnishee paying money into court is entitled to deduct therefrom $5 for compensation, but if the debt due from him to the defendant or judgment debtor is larger than the sum of the amount attached by the garnishee summons and any exemption to which the defendant or judgment debtor is entitled, the garnishee shall deduct that compensation from the money remaining in his hands.

478. If the garnishee pays into court money due to an employee for wages or salary he shall at the same time file in court (without any fee being payable to the clerk for the filing), a statement showing the period with respect to which the wages or salary is due and particulars of any payments made on account thereof and any other deductions claimed therefrom.

479.(1) Upon payment into court by the garnishee the clerk shall promptly notify the plaintiff or judgment creditor or his solicitor, of the amount of the payment.

(2) Upon answer being filed by the garnishee, the clerk shall promptly mail one copy of it to the plaintiff or judgment creditor or his solicitor.

480. Subject to The Execution Creditors Act, money paid into court under garnishee proceedings may be paid out to the person entitled thereto or to the solicitor or agent of that person by order of the court on application made ex parte or on such notice as may be directed.

481.(1) Any person claiming to be interested in the money attached may apply to the court to set aside the garnishee summons or for an order for the speedy determination of any questions in the action or in the garnishee proceedings or for such other order as may be just.

(2) Upon the application the court may

(a) summarily determine any question arising in the action or in the garnishee proceedings, or

(b) direct the trial of an issue to determine any question arising in the action or in the garnishee proceedings, or

(c) make such other order as may be just.

(3) Upon the application the court may make such order for the payment of costs by any person as may be just.

482. Payment made by the garnishee or satisfaction of judgment against the garnishee is a valid discharge to him against the defendant or judgment debtor to the extent of the payment or satisfaction.

483.(1) Where the debt due to an employee is for wages or salary the following portion thereof is exempt from attachment by garnishee for each month in respect of which the wages or salary is payable:

(a) if the debtor is a married person, the sum of $700, or

(b) if the debtor is a married person with dependent children

(i) in his or her custody, or

(ii) under his or her control, or

(iii) in respect of whom he or she is paying maintenance,

$700 plus $140 for each child, or

(c) if the debtor is a widow, widower, unmarried mother or divorced person with dependent children

(i) in his or her custody, or

(ii) under his or her control, or

(iii) in respect of whom he or she is paying maintenance,

$525 plus $140 for each child, or

(d) if the debtor is an unmarried person $525.

(2) The amount of exemption applicable is increased or decreased proportionately where the period in respect of which the wages or salary is payable is greater or less than one month.

(3) If the debtor is employed during part only of a month, he is entitled to the full exemption for the month.

(4) If the amount of the exemption applicable or any portion thereof is paid into court, the clerk shall pay it out to the defendant or judgment debtor.

(5) This Rule does not apply

(a) where the debt sued for, or in respect of which judgment was recovered, was contracted for board and lodging or either of them, or

(b) where the debtor has absconded or is about to abscond from Alberta, leaving no wife or husband or infant children within Alberta, or

(c) to any garnishee summons issued upon any judgment or order for the payment of alimony or for the payment of maintenance by a husband to his wife or his former wife, as the case may be, or for the payment of maintenance for any child of the debtor.

(6) A copy of this Rule shall be attached to or endorsed on each garnishee summons purporting to attach wages or salary.

484. Where both husband and wife are in receipt of wages or salary the court may, upon application, reduce the exemption to which one or both of them would be otherwise entitled under Rule 483.

485. After the commencement of any action wherein the claim is for recovery of a debt of $200 or upwards,

(a) upon affidavit, made by the plaintiff or one of several plaintiffs, if more than one, or by his or their agent swearing postively to the facts establishing the debt and that he has reason to believe, specifying the grounds of his belief, that the defendant

(i) is about to abscond or has absconded from Alberta, leaving personal property liable to seizure under execution, or

(ii) has attempted to remove any of his personal property out of Alberta or to sell or dispose thereof with intent to defraud his creditors generally or the plaintiff in particular, or

(iii) keeps concealed to avoid service of process, and that the deponent verily believes that without the benefit of the attachment the plaintiff will lose his debt or sustain damage, and

(b) upon the further affidavit of one other person swearing that he is well acquainted with the defendant and that he has good reason to believe specifying the grounds of his belief, that the defendant

(i) is about to abscond, or

(ii) has absconded, or

(iii) has attempted to remove any of his property out of Alberta, or

(iv) has attempted to sell or dispose of his property, or

(v) keeps his property concealed with intent to defraud his creditors,

the court may, on application to it *ex parte*, direct the clerk to issue a writ of attachment in Form M in the schedule, which writ shall be executed by the sheriff according to its tenor.

486.(1) If the debtor can be found, a copy of the writ shall be served on the debtor against whose effects it is issued at the time of making any seizure thereunder, or as soon thereafter as service can be effected.

(2) If personal service cannot be effected a copy of the writ shall be left with some apparently adult resident at the place where the seizure is made, or, if no such person is there resident, posted in a conspicuous place on the premises.

487. Immediately after making a seizure the sheriff shall make a return of the writ and with the return transmit annexed thereto an inventory of the property seized and the estimated value thereof and an affidavit of the manner in which service of the writ was effected.

488. The person from whose possession the property was seized under the writ of attachment is entitled to have it returned to him on giving the sheriff sufficient security for or paying into court an amount equal to its value as shown in the sheriff's return made under Rule 487.

489.(1) Unless the property seized is redelivered or relinquished by the sheriff under these Rules he shall, unless otherwise ordered, hold it until the plaintiff obtains judgment in the cause and an execution upon the judgment is delivered to the sheriff.

(2) Where the plaintiff fails to recover judgment or is guilty of unnecessary delay in the prosecution of his action to judgment, the court may order the redelivery of the property so seized to the person from whose possession it was taken, unless some other writ of attachment or execution against the defendant is in the sheriff's hands for execution.

490.(1) Notwithstanding the issue of a writ of attachment the action shall be proceeded with in the ordinary way, the the plaintiff shall not have judgment against the defendant except by order of the court.

(2) Where judgment is given for the plaintiff for an amount less than the amount of the debt, as sworn to in the affidavit upon which the writ of attachment was issued, the court may order that the plaintiff be deprived of his costs either wholly or in part, or that the plaintiff pay to the defendant his costs, either wholly or in part.

491. A writ of attachment may be set aside by the court on satisfactory proof by affidavit that the creditor who obtained the writ did not have reasonable cause for taking the proceedings.

492. Where

(a) livestock or any perishable goods or chattels that from their nature cannot be safely kept or conveniently taken care of are taken under a writ of attachment, the officer who seized them shall have them appraised and valued on oath by two competent persons, and

(b) if the plaintiff desires it and deposits with the sheriff a bond to the defendant

(i) executed by one or more persons whose sufficiency is approved of by that officer in double the amount of the appraised value of such articles, and

(ii) conditioned for the payment of that appraised value to the defendant, together with all costs and damages incurred by the seizure and sale thereof if judgment is not obtained by the plaintiff against the defendant,

the sheriff may sell all or any of those seized articles at public auction to the highest bidder, giving not less than six days' notice of the sale unless any of the articles are of such a nature as not to allow of that delay, in which case the officer shall sell those articles last mentioned forthwith and shall hold the proceeds of the sale for the same purpose as he would have held any property seized under the attachment.

493. If the plaintiff after notice to himself or his solicitor of the seizure of any articles specified in Rule 492 neglects or refuses to deposit the bond or offers a bond with sureties insufficient in the judgment of the sheriff, then after the lapse of four days next after the notice the sheriff is relieved from all liability to the plaintiff in respect to the articles so seized and the sheriff shall forthwith restore them to the person from whose possession he took the articles.

APPENDIX C

TABLES OF CONCORDANCE

EXEMPTIONS ACT

Exemptions Act Section		J.E.A. Section(s)	Notes
1	(1)	157-160	
	(2)	166	
2		----	A
4		----	B
5		163	
6		162(1)	
7	(1)	64(2)	F [No personal liability for sheriff's officers in any event: see s. 177(1).]
	(2)	186(1)	C
8		----	B
9		186(1)	

Explanation of Notes:
A = Subject matter of section not within scope of J.E.A. (e.g. Landlord's distress for rent).
B = Policy of section rejected by Institute.
C = Specific subject matter of section dealt with by general provision of J.E.A.
D = Part of subject matter of section not within scope of J.E.A.
E = Issue addressed by section does not arise under J.E.A.
F = One or more of the issues addressed by section does not arise under J.E.A.

EXECUTION CREDITORS ACT

ECA Section		J.E.A. Section(s)	Notes
1		----	
2		3(2)	
3		----	B
4	(1)	63(1)	
	(2)	63(1)	F [No personal liability for sheriff's officers in any event.]
	(3)	64(1)	
	(4)	72	
	(5)-(7)	185	
	(8)	----	
	(9)	----	
5	(1)	121(a)	F [Garnishee summons issued by sheriff, not clerk.]
	(2)	123	
	(3)	121	
6		167(1)	
7		117(1)(d)(iv); 118(1)	
8	(1)	----	E [Garnishee summons issued by sheriff, not clerk.]
	(2)	129(2)	F [Money would come directly to the sheriff from the garnishee.]
9		13(1)	
10	(1)	169(1),(2)	
	(2)	170(3)	

Explanation of Notes:
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ECA Section	J.E.A. Section(s)	Notes
10 (3)	187	C
11	172(c)	
12	172	
13	167(1); 169(1),(2); 170(3)	
14	3(2); 185	
15	185	
16	----	A
17	----	E [Judgment for price of goods sold has no special status so far as exemptions are concerned.]
18-22	----	B
23	----	E [No 14 day period.]
24-27	----	B
28	35(2)	
29	32; 36(1),(4)	
30	181(3)	
31	174, 186	
32	183(3)(b),(f)	C
33	173(1)	
34	183(3)(b)	C
35	172(c); 173(2)	
36	190(1)(b)	
37	----	E
38	----	E

Explanation of Notes:
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F = One or more of the issues addressed by section does not arise under J.E.A.

ECA Section	J.E.A. Section(s)	Notes
39	15	F [No personal liability for sheriff's officers in any event.]
40	----	A
41	----	B
42	----	A
43	----	A
44	188	
45	186(3)(a)	
46	186(4)	
47	----	
48	190	

Explanation of Notes:

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SEIZURES ACT

Seizures Act Section		J.E.A. Section(s)	Notes
1		----	
2		----	A
3		----	A
4		38-49	
5	(1)	1(bb),(ee); 4; 61	
	(2)	86	
6	(1)	1(bb),(ee); 4; 61	
	(2)	88(3)	
	(3)	----	E
	(4)	88(3)	
	(5)	167(1)	
7	(1)	1(bb),(ee); 4; 61	
	(2)	90	
	(3)	44; 45(2); 46; 48	
	(4)	91(2)(b); 92(c)	
	(5)	----	E
	(6)	93(2)	
	(7)	96	
	(8)	98	
	(9)	----	
	(10),(11)	95	
8		100, 101	
9		----	B

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Seizures Act Section	J.E.A. Section(s)	Notes
10	1(3),(4),(bb); 4; 61	
11	64(3)	
12	66, 80	
13(1),(2),(3)	104	
(4)	—	E
(5)	103(1)	
(6)	83(2)	C
(7),(8)	103(2)	
(9)	83(2)	C
14	—	B, D
15	Part 7	
16	70(3)	
17	70(5)	
18	—	A
19	—	A
20	—	A
21	—	A
22	—	A
23	67	
24	107	
25 (1)	66	D
(2)	80	
(3),(4),(5)	71	
26	63(2)	

Explanation of Notes:
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Seizures Act Section	J.E.A. Section(s)	Notes
27	73	
28	82	
29(1),(3)	74(1)	
(2)	74(3)	
(4)	186	C
(5)	75, 186	C, D
(6)	15	C
(7)	----	
(8)	186	C
(9)	----	
30 (1)	82(2)(a); 83(1)	D
(2),(3)	----	A
31 (1)	70(2)	D
(2)	85	
32	83(1)	C
33	83(2),(4)	[The sheriff always has a discretion as to the method of sale.]
34	73(4); 186	
35	----	A
36	86	D
37	188	
38	----	E [The matter of compensation for any damage suffered by third party is addressed in Part 12.]

Explanation of Notes:

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Seizures Act Section		J.E.A. Section(s)	Notes
39		15	
40		81	
41		—	A
42		—	
43		10	C
44		—	A
45		64(3)	
46	(1)	167(3)	A
	(2)	167(2)	
	(3)	168	
47		190	
48		—	A

Explanation of Notes:

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SELECTED RULES OF COURT

Rule	J.E.A. Section(s)	Notes
342	1(1)(y)	[A judgment for the payment of money into court falls within the definition of money judgment.]
346 (1)	33(1)	
(2)	——	A
347	39	
355	33(1)	
356	34	
359	33(2)	[The critical date is not really the date of issue, but the date the writ is registered in the Enforcement Register.]
360	33(2)	
361	33(2)	
362	33(2)	
363	36	
364	35	
365	7(2)	
366	33(2)(c); 35(3); 37	
368	84	
372, 373	52; 53	
374	54(1),(2)	
375	54(3)	
376	57	C
377, 378	58	

Explanation of Notes:
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Rule		J.E.A. Section(s)	Notes
379		55	
380		60	
381		37	
382		57	
383	(1)	—	A
	(2)	154	
	(3),(4)	186(3)	
465		17; 19(1)(e)	
470	(1)	17; 19(1)(d)	
	(2),(3)	120	
	(4)	121	
	(5)	152(2)	
471	(1)	123	
	(2)	122(1)	
	(3)	129	
	(4)	122(2)	
472		117(1)(h),(j); 138	
473		122(3)	
474		----	
475	(1),(2),(3)	124, 125, 127	
	(4)	151	
476		127	
477		126	
478		138(3)	

Explanation of Notes:
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Rule		J.E.A. Section(s)	Notes
479		----	
480		167(1)	
481	(1)	152(1)	
	(2),(3)	186(3)	
482		153	
483		138; 139; 140; Schedule A	
484		139(5)	
485-493		Part 2	[The "absconding debtor" provisions of the Rules are wholly superseded by the provisions of Part 2.]

Explanation of Notes:
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APPENDIX D

LEGISLATION AND RULES TO BE AMENDED OR REPEALED

LEGISLATION AND RULES TO BE AMENDED OR REPEALED

This appendix identifies the provisions of existing legislation that would have to be repealed or amended if our recommendations were to be implemented. Where amendment of a provision would be required, we briefly describe the required amendment.

Business Corporations Act, R.S.A. 1980, c. B-15

Section 70 of the Act should be amended so that it does not apply to seizures under the *Judgment Enforcement Act*. See Recommendations 50 and 51 and JEA sections 45(3), 46 and 48.

Employment Standards Code, R.S.A. 1980, c. E-10.2

Section 115 should be amended by deletion of the word "sole" in accordance with Recommendation 89.

Execution Creditors Act, R.S.A. 1980, c. E-14

This Act should be repealed.

Exemptions Act, R.S.A. 1980, c. E-15

This Act should be repealed. All of the provisions of this Act which deal specifically with exemptions from seizure under a writ of execution should be repealed. This would leave only section 2, which deals with exemptions on a landlord's distraint for rent, and sections 7 and 9, which would be relevant to a landlord's distraint for rent. These provisions could probably be consolidated with the surviving provisions of the *Seizures Act*: see the discussion pertaining to the *Seizures Act*, below.

Land Titles Act, R.S.A. 1980, c. L-5

Sections 125 through 127 should be amended to make it clear that they do not apply to sales of land by a sheriff under the *Judgment Enforcement Act*: see Recommendation 62 and JEA section 114.

Seizures Act, R.S.A. 1980, c. S-11

All sections of this Act that deal exclusively with seizure under a writ of execution should be repealed. These sections are sections 4 through 11, 15, 45 and 46.

Section 2 should be amended so as to make it clear that the Act does not apply to any seizure proceedings to which the *Judgment Enforcement Act* applies. The remaining provisions of the Act should be amended so as to delete all references to seizure under writs of execution, and similar references.

In short, the amended *Seizures Act* would deal only with seizures under what the Act refers to as a power of distress (to which the PPSA does not apply).

Alberta Rules of Court

The following rules should be repealed: 340, 346(1), 347, 361, 362, 368, 372 through 382, 465, 470 through 493, 588.

Rule 350 should be amended so as to require the issuance of separate writs, since our proposed writ of enforcement is specifically designed for enforcing money judgments.

Several of the rules refer to "writs of execution". If the term "writ of execution" referred exclusively to writs issued on money judgments, we would simply say that these rules should also be repealed. However, the term "writ of execution", as used in the rules, could also apply to, say, a writ of possession. Therefore, the following rules, which refer to writs of execution, should be amended so that it is clear that they do not apply to writs of enforcement as defined in the *Judgment Enforcement Act*: Rules 355, 356, 359, 360, 363 through 367, 369 through 371.